IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD OF HEALTH OF THE CITY OF CHICAGO, DR. ROBERT A. BLACK, Health Commissioner and Acting President of the Board of Health of the City of Chicago,

Petitioners,

vs.

FIELDCREST DAIRIES, INC.,

Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, THERE HEARD ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Regarding the reasonableness of the ordinance, petitioners fail to state that the Master in Chancery who heard the evidence found (R. 1734):

> "There is, in my opinion, strong basis for a finding that plaintiff has proven by a preponderance of the

> evidence that its containers are meritorious and should be permitted to be used."

Both courts below, sitting in Illinois and being familiar with Illinois law, were in agreement that the state Milk Pasteurization Act of 1939 withdrew from the City of Chicago the power to prohibit, as distinguished from regulate, plaintiff's single service containers.

The District Court held that the ordinance was unreasonable, and therefore invalid under Illinois law, if construed to prevent the use of paper milk bottles as "standard milk bottles". Petitioners argue in their brief (pp. 34-36) that the Circuit Court of Appeals also held that the ordinance was unreasonable. That Court, after holding that the City of Chicago had no power to enforce the ordinance prohibiting paper milk bottles after the passage of the Milk Pasteurization Act of 1939, stated:

> "Having thus concluded we find no occasion to discuss at length or decide other controverted questions as to the validity of the ordinance."

In view of this statement, it is difficult to agree with the petitioners that the Circuit Court of Appeals actually decided that the ordinance was invalid for unreasonableness, but we can freely concede that the comments made in the majority opinion do not in any way disapprove the finding of the District Court on this issue.

One of the points on which we rely in this Court is that the plaintiff's paper milk bottle is a "standard milk bottle" and is therefore not prohibited by section 3094 of the Chicago ordinances. The trial court so held, but this holding was disapproved by the Circuit Court of Appeals. We believe that considerations not adequately presented to that court, but which will be found in our Point IV, below, indicate that the trial court was correct in finding that the container is a standard milk bottle.

The trial judge considered the evidence and exhibits for several months and then found that respondent's single-service containers present "no new or unusual health hazard" (R. 1752) and that respondent's single-service containers "conform with the sanitary and health requirements of the city ordinances of the City of Chicago" (R. 1753).

The trial court also found that "the evidence shows that they are safe and sanitary containers in which milk may be delivered. The uncontradicted evidence shows also that containers and receptacles less meritorious in structure and design from those of plaintiff's are in daily ouse in the City of Chicago for the sale of milk, chocolate milk, ice cream, and other liquids by drug stores, hotels, restaurants and soda fountains. . . The dispensing of such articles—including milk and milk products—in paper containers is not, as shown by the evidence, deemed to create any hazard to the public health" (R. 1752-1753).

We respectfully contend that in determining the meaning and validity of the ordinance in question and the effect of the 1939 Milk Pasteurization Act enacted by the legislature, the Circuit Court of Appeals and the trial court were bound to decide the issues of law according to the law of Illinois as pronounced by legislative action and by the decisions of the Supreme Court of the State. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 543. Adopting the rule set forth in this decision, the Circuit Court of Appeals and the trial court found the issues of law in favor of the respondent and we submit that their decisions are in harmony with the law of the State of Illinois.

ARGUMENT

I.

The Ordinance Is Repugnant to the Illinois Statute of 1939 and Is Therefore Invalid.

[Answer to Petitioners' Brief, pp. 12 to 33.]

The city contends (pp. 17-22) that the Illinois Milk Pasteurization Act of 1939 (Ill. Rev. Stat. 1939, c. 56½, pars. 115-134) did not—contrary to the opinion of both courts below—withdraw from the City of Chicago the power to prohibit the use of paper bottles. We strongly contend that it did, and that the trial court, as a Federal Court, was bound to and properly did give effect to the state law, although it was enacted during the pendency of the suit. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538.

No Illinois case interpreting the statute involved has been cited and so far as we know no Illinois court has passed on it. We agree that the Federal Courts, in which the present suit was pending, were entirely competent to decide the question of Illinois law and that this Court is likewise competent to decide the question of local law if it is willing to add or substitute its judgment for that of the courts below.

On pages 31-34 of their brief, the petitioners show that there is nothing in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941) or in *Hawks* v. *Hamill*, 288 U. S. 52 (1933) which should preclude a decision of the question of local law by a Federal Court. The only con-

trary intimation that has ever been made in this case appeared in the petition for certiorari (pp. 36-38) and in petitioners' reply to our answer (pp. 3-4), and we can therefore agree with the statement on page 31 of the petitioners' present brief:

> "The position of the petitioners on this aspect of the case requires an explanation."

Jurisdiction of the Federal Court was invoked in the present case solely because of diversity of citizenship and we know of nothing in any decision of this Court in any way disabling the District Court or the Circuit Court of Appeals from deciding as a matter of local law the effect to be given to an Illinois statute passed while suit was pending. The fact that the statute was passed while suit was pending is sufficient proof that plaintiff did not select the forum with its eye to a favorable ruling as to the meaning of the statute.

The construction of the statute being one of local law, we think that the recent opinion of this Court in the case of *MacGregor, Jr. v. State Mutual Life Assurance Company of Worcester, Massachusetts,* (No. 179, October Term, 1941, decided February 16, 1942), might well be adopted in the present case. There, after allowing certiorari and hearing oral arguments, this Court filed the following *per curiam* opinion:

> "Petitioner brought this action to recover the premium of a life annuity contract purchased by his decedent. The suit was begun in a state court of Michigan, but was removed, because of diversity of citizenship, to the United States District Court for the Eastern District of Michigan. Petitioner's claim is founded on the applicability of Michigan legislation regulating the conduct of insurance business in Michigan. The District Court held that 'the contract involved herein having been executed outside the State of Michigan, the

statutes of the State of Michigan relied upon by the plaintiff are not applicable.' Accordingly judgment went against petitioner. This judgment was affirmed by the Circuit Court of Appeals, 119 F. 2d 148.'

"No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan." Affirmed.

In the present case the trial judge was for many years a lawyer of the Illinois bar, was an assistant attorney general of the State, president of the Illinois Constitutional Convention of 1920, and a member of the Federal district bench since 1929. The author of the majority opinion of the Circuit Court of Appeals likewise was an Illinois practitioner of long standing (having been admitted to the Illinois bar in 1910) and was a representative in Congress and a Federal district judge before his elevation to the Circuit Court of Appeals.

The concurring judge in the Circuit Court of Appeals, although not a member of the Illinois bar, has since 1929 been a member of the Circuit Court of Appeals of the 7th Circuit, which disposes yearly of a large number of cases arising in Illinois and which itself sits in Illinois. In fairness, it must also be said that the judge dissenting in the Circuit Court of Appeals has been judge of the Eastern District of Illinois since 1922, and had previously been a practicing attorney in Illinois since 1904. We think that the presence of a dissenting opinion does nothing more than raise a doubt as to the proper interpretation of the Illinois law which should be resolved in favor of the sovereign state as done by the other three judges

of the two courts below who held views contrary to the dissenting opinion.

We mention the personnel of the courts below who passed upon this case because of the reference in the *MacGregor* opinion to "a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."

We assume that this Court looks not only to the specific qualifications of the personnel of the courts below but also to the fact that they as courts dealing frequently and intimately with matters peculiarly of local law are presumed to be competent to decide such questions correctly. We felt that these considerations were relevant reasons why this Court need not grant the petition for certiorari in this case and we now feel that upon a fuller examination of the case they will be found to be good reasons for an affirmance.

We submit that in case of doubt whether certain power lies with the sovereign state or with its instrumentality, a proper regard for the relationship between the Federal courts and the sovereignty of the state dictates that such doubt be resolved in favor of the sovereign rather than in favor of its instrumentality, such as a municipality. In the absence of authoritative decision of the question by a state court, expediency requires that the doubt be resolved in favor of the sovereign rather than in favor of the creature of the sovereign. Should the decision of a doubtful question in favor of the creature be contrary to later decision of the question by a state court, the Federal court will in the interim have permitted the mere instrumentality of the sovereign to delay the carrying out of state policy. Less harm can result from a decision in favor of the sovereign than one

in favor of its instrumentality. All doubts should be resolved in favor of the unimpeded action of the sovereign state and no surrender of power by the sovereign to its instrumentality should be implied by a Federal court.

Therefore, unless the decision be too clear for argument, the question whether the power remains with the sovereign state or has been surrendered to its instrumentality ought to be decided by a Federal court in favor of the sovereign state. Of course, the petitioners here contend that the decision whether it has the power to prohibit paper milk bottles which the sovereign state has legalized is too clear for doubt. Their position would be more impressive had not both courts below held precisely contrary to the petitioners' contention.

In passing, it should be said that the attempt on the part of the petitioners to make it appear that the Circuit Court of Appeals has taken some power away from the state legislature of Illinois is entirely fallacious. Petitioners say (Brief, p. 30):

> "The boundary between the fields of state and local regulations may not be clearly defined. The decision of the Circuit Court of Appeals in effect takes away from the state legislature the power to fix the boundary and the court, in the exercise of its function to construe statutes, assumes the power itself."

The Circuit Court of Appeals did not hold that the matter was beyond the power of the legislature, but simply held that in the exercise of its power the state legislature had established a public policy for the state which prohibited the enforcement of an ordinance outlawing what the state legislature had approved. The petitioners' real complaint is not that the decision of the Circuit Court of Appeals took any power away from the legislature, but that the court wrongly construed the language of the legislature

in exercising its undoubted legislative power. The decision takes nothing from the power of the state legislature. It does take away from the city the power to defeat, by prohibiting paper milk bottles, the liberal and progressive attitude of the state toward the use under proper regulations of modern containers for milk.

The courts below properly decided that adequate protection of the sovereign power of the State of Illinois and the realization of its objectives in passing the Milk Pasteurization Act of 1939 required a holding that its creature, the City of Chicago, had not been left with the power to defeat such objectives by prohibiting the use of paper containers in the sale of milk. Such a holding does not improperly take away power from the state. It actually reinforces and protects the power of the state from impairment by judicial implication from doubtful language contained in an ambiguous statute. In this holding of the Circuit Court of Appeals we find no refusal by that court—"in effect" or otherwise—to give full recognition to the power of the state legislature.

The consideration by the petitioners of the effect of the Milk Pasteurization Act of 1939 on the power of the City of Chicago to prohibit the use of single service containers for the sale of milk is prefaced by a discussion of certain preliminary matters which we shall refer to here in the order in which they appear in petitioners' brief.

(1) In the first place, a municipal corporation, in Illinois, may exercise only such power as is conferred upon it by the state legislature. Doubt concerning the existence of a power or whether such power has been withdrawn is resolved against the municipality. The doctrine of "home-rule" has received no recognition.

The City of Chicago has no inherent power. It is a

creature of the General Assembly. To prohibit any article, it must be able to point to a state statute giving it power to do so. Furthermore, grants of power to municipalities are strictly construed. This is established by a long line of cases, has been the subject of frequent public criticism by the distinguished corporation counsel of Chicago, Mr. Barnet Hodes, but continues to be the law of Illinois, controlling in this case (*Bullman* v. *City of Chicago*, 367 Ill. 217 [1937]).

Hodes, *Law and the Modern City** (1937) says (pp. 36, 38):

> "Over and over, the Illinois Supreme Court has clung to the traditional view of all jurisdictions, and has declared: A city 'may exercise only such powers as are expressly delegated to it by the legislature and such as are necessarily implied from those expressly given.' And also: A city 'possesses no inherent power.' Time and again, cities have attempted, first by one device and then by another, to break through the barrier set up by these interpretations. But there has been little success in this direction."
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> . . . . . .
>
> "In applying the rule of strict construction whenever cities claim the right to exercise certain powers, the courts are following a well settled principle which, as much as anything else, hamstrings municipalities. This rule, as reiterated in *Arms* v. *City of Chicago*, [314 Ill. 316] a 1924 case, is:
>
> > "'Statutes which grant powers to municipal corporations are strictly construed, and any fair or reasonable doubt of the existence of such powers is resolved against the municipality which claims the right to exercise them.'"

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* The author's preface states:

"The author, of course, accepts full responsibility for the views expressed. They in no way express any official position of the law department of the City of Chicago".

The Illinois rule was stated thus in *City of Chicago* v *Murphy*, 313 Ill. 98 (1924), (at p. 101):

> "Cities may exercise only such powers as are expressly delegated to them by the legislature. The legislature is vested with all powers not taken from it by the State or Federal constitution. Many of its powers may be delegated by it to the cities created by its act. Cities are creatures of the legislature and derive their existence therefrom. They have no inherent powers. All powers of cities are derived from acts of the legislature. The fact that the legislature has the power to enact a law does not confer that power upon city councils but the same must be by legislative act conferred."

In *Consumers Co.* v. *City of Chicago*, 313 Ill. 408 (1924) the Supreme Court of Illinois has expressed the rule in the following language (pp. 411-412):

> "A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily implied in or incident to the powers expressly granted; and third, those essential to the accomplishment of the declared objects and purposes of the corporation, —not simply convenient but indispensable. (*Huesing* v. *City of Rock Island*, 128 Ill. 465; 1 Dillon on Mun. Corp.—5th ed.—sec. 237.) Any fair or reasonable doubt concerning the existence of the power must be resolved against the municipality and the power denied. (19 R. C. L. 769; *City of Chicago* v. *M. & M. Hotel Co.*, 248 Ill. 264; *City of Chicago* v. *Pettibone*, 267 id. 573.)"

As corollaries to the rule that the powers of a municipality come from the General Assembly and are strictly construed are the rules that (1) a municipality may not exercise a power inconsistent with any Act of the General Assembly or with the public policy declared by it and (2) the power granted by the General Assembly may be

withdrawn or curtailed at the will of that body. The General Assembly may resume at any time the power previously delegated to a municipality, and this, of course, may be done by implication.

This doctrine of municipal law is also well stated by the distinguished corporation counsel of the City of Chicago in *Law and the Modern City* (Hodes, 1937, p. 44) as follows:

> "We have seen, up to this point, how two salient principles are invoked to restrict cities—the principle of express authority from the state, and the canon of strict construction against the city. Suppose a city, in its effort to control its own destiny sails by those two shoals. Is it then safe in the sea of state control? Hardly. Ahead is a rew reef.
>
> "The new peril is the principle that if the state sees fit to exercise power in its own name over an activity, the city is at once thrust out of the picture. This is the case even where the city has had jurisdiction for generations and its right to exercise the power has been heretofore firmly established. Application of this principle in Illinois has resulted in a gradual whittling away of many powers of cities, ranging in importance from control of beauty shops, to regulation of transportation lines and other utilities."

In *City of Chicago* v. *Jensen*, 331 Ill. 129 (1928), the defendant was convicted of operating a beauty parlor without a license, in violation of an ordinance of the City of Chicago. Prior to this conviction a state statute went into effect, providing for the regulation of beauty culture. On appeal, the judgment of conviction was reversed, the court pointing out that the ordinance was inconsistent with the after-enacted statute. In discussing prior decisions of the Supreme Court, and the rule of law to be drawn therefrom, the court said (p. 131):

> "This court held that while the legislature may delegate power to a municipality to grant a license

for a particular occupation and exact a license fee therefor, it may at any time take away such power and the State may resume the exercise of the power; that the legislature may repeal or amend any of the provisions of the act for the incorporation of cities and villages at pleasure, and if the provisions of the statute are inconsistent with the powers conferred on the city, the statute will operate as a repeal or amendment of the powers so conferred upon the city; that a city, as a subordinate political authority, cannot interfere with the validity or force of a license issued by the State under a statute; that the statute controls the whole subject matter.

"The statute repealed any power the city may have had to regulate and license beauty culture, the judgment convicting appellant was erroneous, and it will be reversed."

In a case well known in Illinois, *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402 (1925), holding that the Public Utilities act of Illinois repealed by implication the power granted to cities and villages to regulate such matters as headlights on street cars, it was argued that since the ordinance requiring street cars to be equipped with brightly lighted headlights was passed prior to the enactment of the first Public Utilities act, the ordinance would not be abrogated until the Commission had taken some action under the statute inconsistent with the ordinance. The court said (p. 412):

"When the first Public Utilities act came into force, on January 1, 1914, the power of the city over the subject matter of that act ceased to exist, and it could not thereafter pass new ordinances or enforce existing ordinances with reference to matters within the exclusive jurisdiction of the Public Utilities Commission. The power to enforce proceeds from the present or existing power or authority to enact or to provide. A municipality cannot be said to possess the power to enforce an ordinance concerning a subject upon which it has lost the power to pass the ordinance.

> Any attempt to enforce in such a situation would be defeated by interposing the act withdrawing the municipality's power to enact."

In the early case of *Wilkie* v. *City of Chicago*, 188 Ill. 444 (1900), a Chicago ordinance required persons desiring to work as plumbers to obtain a license and pay an annual license fee of $30.00. Shortly thereafter the legislature of Illinois passed an act providing that persons desiring to engage in the business of plumbing should be examined as to their qualifications by a board created for that purpose and that successful applicants should receive certificates. In a suit to restrain the enforcement of the ordinance on the two-fold ground that (1) the city was without power to license the business of plumbing, and (2) even if it had such power, the ordinance was in conflict with the later statute, and hence invalid, the Supreme Court affirmed a decree restraining the enforcement of the ordinance.

After pointing out that the power of the city to license the occupation of plumbing was, at least, very doubtful, the court said (pp. 452-453):

> "While the legislature may delegate the power to municipalities to grant a license for a particular occupation and to exact a license fee, they may, at any time, take away such power or resume the exercise of it themselves. The legislature may repeal or amend any provision of the act for the incorporation of cities and villages at their pleasure, and if the provisions of the act of 1897 are inconsistent with the power claimed by the city, they will operate as a repeal or amendment of the charter to that extent. * * * By this law the legislature have prescribed the test which shall enable a person to engage in the business of plumbing, and the city, by its proviso, has prescribed another and additional test. The legislature, by the law, say he is authorized to work at his trade throughout the State if he has the required

certificate. The city of Chicago, by the proviso to the ordinance passed in pursuance of that law, says that he shall not work at his trade in that city except by paying $30 additional and receiving another license. The city, as a subordinate political authority, cannot interfere with the validity or force of the license issued by its board under the law. That these provisions are inconsistent is plain."

The force and logic of this decision is inescapable. It is clearly determinative of the invalidity of the prohibition of paper bottles which the City of Chicago seeks to enforce and thereby forbid what the superior political authority approves and permits. The majesty of the state law applies to Chicago ordinances now with the same force as it did forty years ago.

The texts on the subject of municipal legislation announce the same rule. See 2 McQuillin on Municipal Corporation, 572 (2d. ed.—1928), quoted by the Circuit Court of Appeals.

In 43 Corpus Juris, 215-217, "Municipal Corporations," the additional rule is stated that a municipal ordinance must not conflict with the public policy of the state as determined by the state legislature, thus:

> "Since a municipal corporation is a creature of the state, continuing its existence under the sovereign will and pleasure of the state, possessing such powers and such only as the state confers upon it, subject to addition or diminution of power at the state's supreme discretion, municipal regulations *must not directly or indirectly contravene the general law, nor can such regulations be repugnant to the policy of the state as declared in general legislation.*" (Italics ours.)

The Illinois cases are uniformly to the same effect.

In *City of Chicago* v. *Union Ice Cream Mfg. Co.*, 252 Ill. 311 (1911), cited by the petitioners (Brief, pp. 12-13)

the Supreme Court passed upon the validity of Section 1160 of the Municipal Code of Chicago which then provided for a penalty of not less than $5.00 nor more than $100.00 fine for any person who sold or offered for sale any impure or adulterated food. A statute, the Pure Food Act of July 1, 1907, enacted two years after Section 1160 of the Municipal Code was passed, provided for a greater penalty. In sustaining the ordinance as valid the court said (p. 313):

> "*The laws of the state operate within the limits of municipal corporations the same as elsewhere, unless otherwise clearly provided by municipal charters or statute. Local laws and regulations are at all times subject to the paramount authority of the legislature.*" (Italics ours.)

In the last paragraph of this decision the Supreme Court used the following language which is indeed applicable to the ordinance here, saying at p. 315:

> "Municipal authorities cannot, under a general grant of power, such as article 5 of the City and Village act, *adopt ordinances which infringe the spirit of a State law or are repugnant to the policy of the State as declared by general legislation*, but the police regulations of a municipality may differ from those of the State upon the same subject, if they are not inconsistent therewith. (*McPherson* v. *Village of Chebanse*, 114 Ill. 46.) *This ordinance does not prohibit what the statute permits.* While the ordinance attaches a less penalty for its violation than does the statute, we find no repugnancy between them. The general policy under both is the same." (Italics ours.)

The pertinent language in this decision is "this ordinance does not prohibit what the statute permits." Obviously this is the test to be applied when an ordinance and state statute are to be construed.

In *City of Chicago* v. *Drogasawacz*, 256 Ill. 34 (1912) the

regulation of the bread and bakery business by ordinance was involved. The principal question was the right of the city under the state statutes to enact the bakery ordinance. The ordinance was sustained as valid, not being in conflict with the statute, and on page 37 the Court said:

> "Municipal ordinances must be in harmony with the general laws of the State (*City of Chicago* v. *Union Ice Cream Mfg. Co.*, 252 Ill. 311), but this ordinance does not in any way conflict with the State law."

Again, in the case of *City of Marengo* v. *Rowland*, 263 Ill. 531 (1914) the court held an ordinance of the City of Marengo requiring the closing of barber shops on Sunday invalid and again stated on page 534:

> "Municipal authorities, under general grant of power, cannot adopt ordinances *which infringe the spirit of a State law or are repugnant to the general policy of the State* (*City of Chicago* v. *Ice Cream Co.*, 252 Ill. 311; 25 Am. & Eng. Ann. Cas., 675 note; *City of Clinton* v. *Wilson*, [257 Ill. 580] *supra.*) The public policy of the State is found in its constitution and statutes, and, when they are silent, in its judicial decisions and the constant practice of its public officials." (Italics ours.)

We submit that if, as the court said in these decisions, a city cannot adopt an ordinance infringing the *spirit of a state law*, then it certainly cannot by any process of reasoning, enforce one. Since the legislature has clearly expressed the *public policy* of Illinois on health and the use of single service milk containers, such public policy is not to be rendered inoperative by ordinances or regulations of a city repugnant to it whether passed before or after such statute.

In *City of Lewistown* v. *Harrison*, 282 Ill. 461 (1918) the Illinois Supreme Court held that an ordinance which prohibited the *barter, exchange or sale* of intoxicating

liquor was authorized by the Illinois Cities and Villages Act, which gave to municipalities the power to prohibit the *sale* of such liquors. To make more definite and specific by ordinance what is provided by general legislation is not a violation of statute, but merely makes its application more certain. But if the ordinance were in conflict with the spirit of state law, with public policy or inconsistent with the language of the statute, then it would be invalid. The rule was clearly expressed by the court in the following words (p. 464):

> "A municipality may by ordinance restrict, regulate and prohibit the same acts which are punishably and penalized under the law of the State, so far as authorized so to do by law. It may make more definite regulations than are usually provided by general legislation and enforce them by appropriate penalties. It cannot, however, adopt ordinances which *infringe the spirit of a State law* or are *repugnant to the policy of the State* as declared by general legislation, but the police regulations of a city may differ from those of the State on the same subject *if not inconsistent therewith.*" (Italics ours.)

The fundamental weakness in the Chicago ordinance in question is that it prohibits (if construed as petitioners contend) what the statute *in express terms* permits. It is not an effort to fill in the details of a broad, general statute. To adopt and enforce a construction *prohibiting* the use of *single-service containers* would result in nullifying a provision of the statute, which is the paramount regulation. Legislatures are not subservient to municipalities in establishing public policy.

In construing Section 38 of the Illinois Prohibition Act and an ordinance enacted by the City of Litchfield which prohibited the manufacture and sale of intoxicating liquor, the Supreme Court of Illinois in *City of Litchfield*

v. *Thorworth*, 337 Ill. 469 (1929) pointed out that the city was bound by the definition of intoxicating liquor contained in the statute and had no authority to prohibit the sale of liquor not prohibited by the statute. At page 475 the court said:

> "Section 2 of the Prohibition Act defines the phrase 'intoxicating liquor.' It is the sale of liquor of the kind specified in the statute that is prohibited. The statute confers authority on municipal corporations to prohibit by ordinance the sale of the kind of liquor prohibited by the statute. *The municipality is bound by the definition contained in the statute and cannot prohibit the sale of liquor not prohibited by the statute.*" (Italics ours.)

It is clear beyond peradventure from the foregoing cases that the City of Chicago has no inherent power, that its power to regulate milk comes from the State, that the State has the right to take that power away before or after the enactment of the city's ordinances, that the ordinances must not be in conflict with the provisions of the State statutes, and that the city has no right to prohibit what a state statute or valid rules and regulations adopted pursuant thereto permit.

It will be well to bear in mind those general rules in considering the "saving clause" which the City relies on, namely, Section 19 of the Act. Before passing to a discussion of that question, we wish to call the Court's attention to another limitation on the power of the city shown by the case of *City of Rockford* v. *Hey*, 366 Ill. 526 (1937). In that case it was held that the City of Rockford had no power (under the same sections of the statute that the City of Chicago is relying on in the present case) to prohibit the sale in Rockford of ice cream manufactured in Sterling, Illinois, and Dixon, Illinois, by requiring a license (involving an inspection of the factories by Rock-

ford inspectors) as a condition precedent to such sale. This is the latest word of the Illinois courts on the subject. The Court said (p. 530):

> "In Illinois, a city organized under the Cities and Villages act has such powers, only, as are therein expressly delegated by the General Assembly or necessarily implied to render the grant of specific powers effective".

and (p. 531):

> "Legislative powers of municipal corporations are strictly construed, and *any rational doubt* as to the existence of power must be resolved against the municipality." (Italics ours.)

The Court then concluded (pp. 533-534):

> "In short, the issue is whether plaintiff, the City of Rockford, may require ice cream factories, located in other cities, to meet sanitary requirements prescribed by the former city in order to entitle them to Rockford licenses upon payment of the annual fee for inspection of their plants.
>
> "Municipalities have no extra-territorial jurisdiction except insofar as it is expressly or impliedly delegated by statute. (55 A. L. R. 1183; *City of Chicago* v. *Brent*, 356 Ill. 40; *Strauss* v. *Town of Pontiac*, 40 id. 301.) An inherent or implied limitation upon the city in the exercise of the powers delegated to it by the legislature is that such powers shall be exercised within the corporate boundaries of the municipalities.
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> . . . . . .
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> "The legislature has not delegated power to municipal corporations to pass a regulatory and license ordinance which assumes to regulate ice cream factories outside their corporate limits. The provisions which plaintiff admits extend to ice cream factories in other cities are so inseparably connected with other provisions applicable locally as to render the entire enactment void."

It is clear under this case that control of the respondent's plant at Chemung, McHenry County, Illinois, is exclusively within the jurisdiction of the Department of

Health of the State of Illinois and that the State statute (Petitioner's brief, Appendix A, p. 80) relating to pasteurized milk which provides, in part, that all pasteurized milk shall be placed in its final delivery containers at the plant, that bottling or packaging of milk shall be done at the place of pasteurization by approved mechanical equipment, and that it shall be unlawful for any person to sell or serve any pasteurized milk except in the original container in which it was placed at the point of pasteurization, contemplates the approval of the State Department of Health of respondents' operations and equipment without requiring the approval of the City of Chicago.

It is further apparent that if, after the state has approved respondent's plant and equipment for packaging milk in paper bottles, only, and has prohibited the respondent from selling its milk in any containers other than those in which it was placed at the point of pasteurization, the City of Chicago is permitted to stop that milk at its city limits and forbid its sale, the city is thereby permitted to exercise indirectly an extra-territorial power over the respondent's plant and equipment which the *Hey* case expressly forbids. The City of Rockford was therein denied power to prohibit, by an inspection requirement, *the sale in Rockford* of ice cream made elsewhere.

It is important to notice this geographical division of authority between the State of Illinois and the City of Chicago, because the sole reliance of the City of Chicago for its power is on cases like *Koy* v. *City of Chicago*, 263 Ill. 122; *City of Chicago* v. *Bowman Dairy Co.*, 234 Ill. 294, and *City of Chicago* v. *Union Ice Cream Co.*, 252 Ill. 311, where the pasteurizing or manufacturing plant was located within the confines of the City of Chicago.

(2) It is true, as the petitioners contend (Brief, p. 12),

that there is no constitutional objection to regulation of the same subject by statute and ordinance. Aside from the constitutional question this rule is subject to the qualification that the ordinance must be in harmony with the statute and with state policy; in the event of conflict or inconsistency the ordinance must give way. This qualification of the rule is elaborated in *City of Chicago* v. *Union Ice Cream Co.*, 252 Ill. 311 (1911), from which both the petitioners and we have quoted.

(3) On the question of the powers of municipalities [Petitioners' Brief, pp. 13-17], in Illinois, to regulate the sale and distribution of milk, it should be added that such regulation must be reasonable and that whether a particular regulation is or is not reasonable is a judicial question. In *Koy* v. *City of Chicago*, 263 Ill. 122 (1914), from which the defendants have quoted extensively the Court said (p. 127):

> "When the legislature has authorized a city council to pass ordinances upon any subject, the power thus conferred must be reasonably exercised. Whether its exercise in a particular case is reasonable is a judicial question, and an unreasonable ordinance will be held void by the courts."

In *City of Chicago* v. *C. & N. W. Ry. Co.*, 275 Ill. 30 (1916), the court, in holding unreasonable and therefore invalid, a section of the milk ordinance of the City of Chicago, said (p. 38):

> "The city council has authority to pass ordinances regulating this question, and the question of regulation, in the first instance, rests with the municipal authorities, but whether its exercise in a particular case is reasonable is a judicial question. There must be some logical connection between the object sought to be accomplished by such an ordinance and the means prescribed to accomplish the end. An unreasonable ordinance will be held void by the Courts." (Citing cases.)

We emphasize at this point, the necessity that an ordinance be reasonable. Whether the particular ordinance now in question is a reasonable exercise by the City of its power to regulate certain aspects of the milk industry in the interest of the public health is a matter we discuss elsewhere in detail (Points II and III, *infra*). The assertion of the city that it had power "to regulate every detail of the milk industry" (Brief, p. 15) prior to the enactment of the Milk Pasteurization Act, and that it had power to prohibit the use of single service containers, is an assumption which this suit was originally brought to challenge.

(4) The assertion (Petitioners' Brief, pp. 16-17) that the ordinance required the use of glass containers—under the construction placed by the Circuit Court of Appeals on the phrase "standard milk bottles"—is treated fully under Point IV and the applicable rule of law is discussed. It is sufficient here to point out that under a more recent decision of the Supreme Court of Illinois than that cited to and relied on by the Circuit Court of Appeals the meaning of legislative language is not static. The fact, therefore, that single service containers were not in general use on January 4, 1935,—the date of the enactment of the ordinance—and consequently were not considered by the City Council at that date as being "standard milk bottles" does not preclude such containers from being within the meaning of that phrase in interpreting the ordinance today. We submit that the correct interpretation of the ordinance was adopted by the District Court which found single service containers to be "standard milk bottles".

Effect of the 1939 Statute on the Powers of Cities.

After pointing out that Section 19 of the Milk Pasteurization Law of 1939, is in the same language as the title of the A[illegible], the petitioners develop in detail their contention that, by reason of that section, "whatever aspects of the milk industry may be subjected to statewide regulation by the statute, cities and villages retain to the fullest extent every power that they had theretofore" (Petitioners' Brief, p. 19). This result is said to be revealed by a "cursory reading of the saving clause" and "a detailed exposition of the language of the section leaves no possible doubt" (Brief, p. 19).

Before discussing the analysis or exposition of this section of the Milk Pasteurization Act of 1939, and its effect on the regulatory powers of the City of Chicago over certain phases of the milk industry, that Act must be considered in relation to previous legislation on the same subject.

In 1925 the General Assembly enacted "An Act in relation to the pasteurization of milk." (Smith-Hurd Ill. R. S., 1925, c. 56½, pars. 101-113.) In 1935, this Act was amended. (Ill. R. S. 1937, c. 56½, pars. 101-114). As amended it was in force until the enactment of the present statute, Section 20 of which provides:

> "The Act entitled 'An Act in relation to the pasteurization of milk', approved June 30, 1925, as amended June 29, 1935, is hereby repealed."

The earlier Act provided for application to, and issuance by, the State Department of Public Health, of a Certificate of Approval to persons or firms engaged in operating a pasteurization plant who comply with the provisions of the Act. The Act imposed certain requirements with respect to the construction of such plants, for

certain apparatus for recording temperatures during pasteurization and for filter tests for sediment or stain. In addition, employees in pasteurization plants were required to furnish annually to the State Department of Health a medical certificate showing them to be free of certain specified diseases, and provision was made for an "automobile laboratory" to enable the Department of Health to make chemical and other scientific analyses. Upon failure to comply with the requirements of the statute, provision was made for revocation of the certificate of approval, and a penalty was fixed for violation thereof.

In 1939 the legislature enacted the present Milk Pasteurization Act. The two Acts cover the same subject matter, but in the present statute each provision is treated with an elaboration not present in the earlier Act. New requirements are added and the old made more stringent.

There is, moreover, another major difference in the Acts. What might be characterized as a "saving clause" in the old Act, but which it would perhaps be more accurate to describe as an "exception," provides:

> "The provisions of this Act do not apply to pasteurization plants located in and furnishing milk or milk products for consumption in municipalities containing 500,000 or more inhabitants, according to the last census, which have established a system of regulation and inspection of the pasteurization plants supplying milk for consumption in such municipalities or to any pasteurization plant which supplies milk or milk products solely for consumption in such municipalities." (Ill. R. S. 1937, C. 56½, "Foods", par. 113.)

The evident purpose of this section was to exclude the City of Chicago from the operation of the statute, since no municipality in Illinois, then or now, except Chicago,

satisfied the population requirement. Obviously, the legislature, in 1925, in first entering this field, was satisfied that the pasteurization regulations then in effect in Chicago were not inadequate, though even at that date it is noteworthy that the scope of the exception was confined to plants supplying products solely for consumption in that City.

The Milk Pasteurization Act of 1925 was the first attempt by the State of Illinois to regulate the distribution and pasteurization of milk. It was neither comprehensive nor exhaustive and did not cover the field in detail. The City of Chicago, alone of the municipalities in the State, by the device of population classification, was excluded from the operation of the statute. The present statute, which repealed the Act of 1925, makes standards more stringent. Additional requirements extend the scope of prior regulations. The utmost care is taken to include all important details with reference to the sale and distribution, as well as the pasteurization, of milk and to give the State Director of Health power to supplement the requirements. The application of this Act is statewide. No municipality is exempted. It is immaterial that a city or village may or may not have established a system of regulation and inspection. No longer does the City of Chicago have the exemption provided by the 1925 statute.

The intention of the legislature that the Act is to be effective throughout the state without territorial or other limitation is apparent from the language of the statute (sec. 2):

> "*Any person* operating a pasteurization plant who distributes, delivers or sells pasteurized milk or pasteurized milk products for consumption *in the State of Illinois* shall annually make application to

the Department for a Certificate of Approval." (Italics ours.)

Section 3 provides:

> "*Any person* who shall hereafter engage in operating a pasteurization plant for the purpose of distributing, delivering, or selling pasteurized milk or pasteurized milk products for consumption *in the State of Illinois*, shall before engaging in such business make application to the Department for a Certificate of Approval." (Italics ours.)

Section 9 states:

> "Any person selling, delivering or distributing milk or milk products *in the State of Illinois* who shall heat milk or milk products or subject milk or milk products to other treatment in an effort to make the milk or milk products safe for human consumption or to preserve its keeping qualities shall comply with the provisions of this Act." (Italics ours.)

Section 11 provides:

> "No milk or milk products sold, distributed or delivered *in this State* shall be heated or subjected to any other treatment in an effort to make it safe for human consumption or to preserve its keeping qualities *unless such milk or milk products are processed in compliance with the provisions of this Act.*" (Italics ours.)

Other sections of the act indicate a recognition of single-service containers and show that the state has assumed control of the equipment for the packaging of milk and prohibited its sale except in containers filled on such equipment at the point of pasteurization.

Section 8 provides:

> "All pasteurized milk and milk products shall be placed in their final delivery containers in the plant in which they are pasteurized. *It shall be unlawful*

for hotels, soda fountains, restaurants, grocery stores, milk depots, milk stations and similar establishments to sell or serve any pasteurized milk or milk products except in the original container in which it was placed at the point of pasteurization, provided that this requirement shall not apply to milk or milk products consumed on the premises which may be served from the original container or from a dispenser approved by the Department for such service. The sale or distribution of bulk, loose or dipped pasteurized milk or milk which has been heated within the purview of this Act is hereby prohibited."

The first paragraph of Section 15 is as follows:

"Any pasteurization plant coming under the provisions of this Act shall conform with all of the following items of construction; equipment, maintenance and operation *and in accordance with minimum requirements adopted by the Director for interpretation* and enforcement of this Act." (Italics ours.)

Following and as an integral part of this section are certain items, including the following:

"Item 10. All multi-use containers and equipment with which milk or milk products come in contact shall be constructed in such manner as to be easily cleaned and shall be kept in good repair. *Single service containers,* caps, gaskets and similar articles *shall be* manufactured and transported in a sanitary manner." (Italics ours.)

"Item 18. *Bottling or packaging of milk and milk products shall be done at the place of pasteurization by approved mechanical equipment.*" (Italics ours.)

Pursuant to the power therein granted, the Director of the Illinois Department of Public Health has promulgated "minimum requirements" for interpretation and enforcement of this Act, providing, in part, as follows:

"Satisfactory compliance.—This item shall be deemed to have been satisfied if: * * *

(5) All *single-service containers,* caps, gaskets and

similar articles are manufactured and handled in accordance with requirements of the Department.

(a) The buildings and rooms in which *single-service containers* and container caps and covers are manufactured, packed, stored, and handled shall be clean, well lighted and ventilated, and free of dust and flies, as prescribed in items 1, 2, 3, 4, 6, 7, 8 and 11.

(b) The average bacterial plate count of the stock from which *single-service containers* and container caps and covers are made shall not exceed 100 colonies per gram. No substance shall be present in finished single-service containers and container caps and covers which is toxic.

(c) All operations of the fabrication plant and during transportation of the manufactured articles shall be so conducted as to reduce to a minimum the possibility of contaminating the manufactured articles, as prescribed in items 13, 14 and 15.

* * * * *

(e) All *single-service containers* and container caps and covers shall be so treated *as to be as impervious to milk* and milk products as practicable." (Italics ours.)

Section 16 of the statute is in part as follows:

"The Department may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any certificate of Approval because of the violation of any of the provisions of this Act or for any of the following causes:

(a) Insanitary conditions of plant surroundings within the control of the plant management, insanitary methods of handling milk, milk products or *milk containers or equipment.*

(b) Employment of careless, indifferent and inefficient personnel.

(c) Violation of any of the provisions of this Act or of the minimum requirements for interpretation and enforcement of the Act.

(d) Failure to display Certificate of Approval to the public at all times when such Certificate of Approval has been issued as provided in this Act.

(e) Displaying to the public any Certificate of Approval which has been suspended or revoked or which has expired. * * *" (*Italics ours.*)

We shall refer below to the effect to be given to Section 19 of the Act, relied upon by the City (pp. 17 to 23) as preserving its right to prohibit paper bottles which the sovereign state permits.

Another statute should be noticed, the statute (Ill. Rev. Stats. 1939, c. 111½, "Public Health", par. 22) establishing the State Board of Health, whose duties are now transferred to the Illinois Department of Health by Illinois Revised Statutes, 1941, c. 127, "State Government", par. 55. The Public Health Statute provides in part:

"Sec. 2. The State Board of Health shall have the general supervision of the interests of the health and lives of the people of the state. * * *

The Board shall have authority to make such rules and regulations * * * as they may from time to time deem necessary for the preservation and improvement of the public health, * * *

It shall be the duty of all local boards of health, health authorities and officers, * * * of the State or any * * * city * * * thereof to enforce the rules and regulations that may be adopted by the State Board of Health * * *."

It will be noticed that under the terms of the above Acts the State of Illinois, as it has the undoubted right to do, has taken unto itself the approval of not only the plant but also the equipment and methods of operation of every person who pasteurizes milk for sale in the State of Illinois. It also has occupied the following fields of milk sanitation: It requires that the "bottling or

packaging" of milk shall be done at the place of pasteurization. It requires that all pasteurized milk shall be placed in final delivery containers in the plant in which it is pasteurized. It makes it unlawful for any person in the state to sell or serve any pasteurized milk except in the original container in which it was placed at the point of pasteurization.

The State of Illinois has recognized expressly, both by the Milk Pasteurization Statute and by the lawful requirements made pursuant to it, that single-service containers (as paper milk bottles are now known), when kept as provided by the requirements and when "so treated as to be as impervious to milk and milk products as practicable" are entirely proper containers for the sale of pasteurized milk throughout the State of Illinois. There is not one phrase or word in the statute mentioning the words "standard milk bottles", but rather the entire statute is broad and uses the words "multi-use containers", "single-service containers", "container caps and covers", and "fabrication plant".

It is apparent that the legislature recognized and approved the use of single-service containers and that any construction of the ordinance in question which prohibits them is contrary to the spirit of the state statute and of the public policy it establishes.

It is contended by petitioners that the purpose of this statute is to "prescribe minimum sanitary standards" and to place "a floor under municipal milk regulations", with the result that a municipality may "impose higher standards than those imposed by the statute" (Brief, p. 22). The power thus reserved to municipalities is, petitioners argue, subject only to the limitation "that the municipal regulations must not fall below the minimum standards fixed by the state". (Brief, p. 22).

Petitioners contended in their petition for certiorari that the purpose of the saving clause was to provide state regulation in "many municipalities so small that their officers are unable to adopt and enforce adequate regulations of the milk industry" (Petition, p. 27). In their reply to our answer they claimed that this language of theirs had been misunderstood and that really "defendants' contention is that the statute is designed to prescribe minimum sanitary standards which are effective throughout the state, both in rural and urban communities". (Reply to answer to petition for certiorari, p. 11.) The latter idea is repeated in the petitioners' latest effort (Brief, p. 22) and the following comment is added:

> "The statute thus places a floor under municipal milk regulations."

If this were the legislative intention, it seems strange that language to that purpose was not used in the present saving clause. That the Illinois legislature knows how to use such language is apparent from the 1941 act in relation to Grade A Milk and Grade A Milk Products, approved July 11, 1941 (1 Ill. Session Laws, 1941, p. 809; Ill. R. S., 1941, c. 56½, "Foods", paras. 152-169) of which section 18 (Ill. R. S., 1941, c. 56½, para. 169) states:

> "Nothing in this Act shall impair or abridge the power of any city, village or incorporated town to regulate the production, handling, storage, distribution, sale or delivery of milk or milk products, *provided the minimum requirements under this Act are observed.*" (Italics ours.)

Furthermore, in the 1939 Act itself, the legislature used words which would have been appropriate to express the petitioners' present construction of the saving clause when in section 15 (Petitioners' Brief, p. 84) it referred to

"minimum requirements adopted by the Director for interpretation and enforcement of this Act".

The petitioners' contention that the statute simply places "a floor" under the city ordinance is reached by a novel method of interpretation. Because Section 15 of the Act provides that the construction, equipment, maintenance and operation of pasteurization plants shall conform with the requirements of said section and, in addition, be "in accordance with minimum requirements adopted by the Director for *interpretation and enforcement* of this Act," it is concluded that further requirements may be imposed by some agency other than the State and that this agency could only be a city or a village (Brief, pp. 21-22). If such were the intention of the General Assembly it would seem that appropriate language to accomplish that result would have been employed. In fact, however, the language itself negatives such interpretation. "Minimum requirements" is defined in Section 1 (h) as "the code formulated *by the Director for interpretation and enforcement* of this Act."

The language of the statute thus far shows no intention to permit cities and villages to occupy the same field of regulation as the state, in the sense that an ordinance of such municipality may "prohibit what the statute permits," or impose different and inconsistent requirements from those enumerated in the statute. If cities and villages may "make further and more definite regulations" (in the language of *City of Chicago* v. *Union Ice Cream Company*, 252 Ill. 311, *supra*) such regulations must "not prohibit what the statute permits", a condition laid down by the Supreme Court of Illinois in that case which qualifies and circumscribes municipal action in such instances. The power of the City of Chicago to regulate the sale and distribution of milk is conditioned by the

limitation that it shall "not prohibit what the statute permits."

The contention (Petitioners' Brief, p. 21) that there is no conflict between the ordinance which "prohibits" the use of single service containers and the statute which permits and "regulates" their use is without merit.

It is the contention of the petitioners now as it was in the trial court, that their right to prohibit paper bottles is preserved by Section 19 of the 1939 Milk Act (Ill. R. S. 1939, c. 56½, para. 133):

> "Nothing in this act shall impair or abridge the power of any city, village or incorporated town to regulate the handling, processing, labeling, sale or distribution of pasteurized milk, and pasteurized milk products, provided such regulation [does] not permit any person to violate any of the provisions of this act."

The word "does" is not a part of the act as passed, but may fairly be implied.

We turn now to consideration of the effect of this section. We have seen that prior to 1939 the sale and distribution of pasteurized milk in Illinois was regulated by statute. By express provision of that statute the City of Chicago was excepted from compliance with its requirements. The sale and distribution of pasteurized milk in all other cities and villages in Illinois was, however, controlled by the State. In 1939 the earlier statute was supplanted by the present Milk Pasteurization Act. A comparison reveals that the later Act is, in reality, an exhaustive and comprehensive revision of the earlier Act, remedying certain omissions and regulating in detail the entire field of milk distribution. By the new Act the City of Chicago is placed on the same plane as other Illinois municipalities.

The office of a saving clause is to preserve from destruction some special thing out of the general things mentioned in the statute. *Crawford on Statutory Construction*, page 612 (1940); 2 *Lewis' Sutherland on Statutory Construction*, 678 (1904). Since its function is not to repeal the main provisions of the Act, no saving clause should be so construed as to destroy those provisions. Yet the contention of the petitioners that municipalities may forbid what the statute permits is to render the Act *inoperative* to that extent. If the City of Chicago may prohibit the use of single service containers which are expressly sanctioned by the statute, is there any reason why it may not "in a desire to exercise the utmost vigilance" require a different method in the pasteurization of milk although Section 11 of the Act specifically provides that no milk sold or delivered in the State of Illinois shall be subjected *to any other treatment* to make it safe for human consumption than the processing provided by the Act? And if the City of Chicago may forbid the use of single service containers for the sale and delivery of milk within the municipal confines, is there any reason why it should not require additional or different methods of operation in pasteurization plants within the territorial limits of such city, although Section 4 of the statute provides that upon compliance with the provisions of the Act the Director shall issue a Certificate of Approval to persons applying therefor? And if it may impose such additional requirements, is not such Certificate of Approval rendered ineffective?

One difficulty with the City's argument that the statute establishes "minimum requirements" is in answering the question: Who determines whether a requirement is a minimum or a maximum? Is the City's judgment on that question to prevail against the State's?

It is clear that the only effect to be given to Section 19 is, first, that it prevents a repeal by implication of all power of the municipality to regulate milk, and, second, that the city's power continues unimpaired as to all of those numerous matters not governed by the statute or by the minimum requirements promulgated pursuant thereto. It gives the City no right to enforce ordinances in conflict with the statute or the regulations made thereunder.

That this is true is apparent from the proviso to Section 19, which expressly prohibits any city, village or incorporated town from permitting "any person to violate any of the provisions of this Act." To violate is "to infringe on", "to disturb", "to disregard". If a municipality may not permit any person "to infringe on, or to disturb, or to disregard" any provision of the Act, such municipality may not *itself* "infringe on, or disturb, or disregard" any provision of the Act. But to forbid the use of single service containers, the use of which is expressly sanctioned by the statute, is "to infringe on or to disturb or to disregard" the plain language of the statute.

Petitioners place great reliance upon *City of Ottawa* v. *Brown*, 372 Ill. 468 (1939), which involved the following saving clause in "An Act to regulate the Storage, Transportation, Sale and Use of Gasoline and Volatile Oils", in force July 1, 1919 (Ill. Session Laws, 1919, p. 692; Hurd's Illinois R. S. 1919, c. 38, Criminal Code, par. 54q).

> "Except in cities or villages where regulatory ordinances upon the subject are in full force and effect, the Department of Trade and Commerce shall have power to make and adopt reasonable rules and regulations governing the keeping, storage, transportation, sale or use of gasoline and volatile oils."

The petitioners point out that in this decision the Supreme Court of Illinois held that a municipality in which, on July 1, 1919, regulatory ordinances on the subject were in force, had the power to amend its ordinance later without regard to any conflict between city and state regulation.

The important thing about the saving clause in this statute is not that it was given the effect shown in *City of Ottawa* v. *Brown*, but that the Supreme Court in a previous case gave to the saving clause a narrow construction which withdrew all the power to regulate the subject matter involved from all municipalities except those which *at the effective date of the act* had ordinances in force dealing with such subject matter. The previous case was *Kizer* v. *City of Mattoon*, 332 Ill. 545 (1928), where the court had before it the validity of an ordinance of the City of Mattoon enacted after July 1, 1919, purporting to regulate the keeping, storage, sale, etc., of gasoline. Plaintiffs sought an injunction against the enforcement of the ordinance and losing in the trial court were appellants in the Supreme Court of Illinois. There the plaintiffs contended that the legislature had taken the power of regulation from cities by the act of July 1, 1919, and the defendants contended that under clause 65 of Section 1, Article 5, of the Cities and Villages Act enacted in 1874 (which is the act relied on by the City of Chicago here), the City of Mattoon had the power to enact and enforce the ordinance. The City of Mattoon contended that the act of 1919 did not repeal its power under clause 65 and "that there is not such clear repugnancy between the provisions of these laws that they cannot all be carried into effect". The court said (pp. 549-550):

"The power to pass ordinances such as the one

here in question was delegated to cities by the State through its legislature. Where the State delegates such power to a municipality it may resume it through legislative action and thus deprive the municipality of the right to exercise it. (*City of Chicago* v. *Phoenix Ins. Co.*, 126 Ill. 276; *Wilkie* v. *City of Chicago*, 188 *id.* 444.) Prior to July 1, 1919, the exclusive power of regulation here involved was lodged in cities and villages by virtue of clause 65 above quoted. By its act to regulate the storage, transportation, sale and use of gasoline and other volatile oils, in force July 1, 1919, the State withdrew from municipalities this exclusive power of regulation and gave to the Department of Trade and Commerce exclusive power to make and adopt reasonable rules and regulations governing the keeping, storage, transportation, sale or use of gasoline and volatile oils, except in cities or villages where regulatory ordinances upon the subject were in full force and effect. * * * The City of Mattoon on July 1, 1919, not having in full force and effect regulatory ordinances on the subject, its delegated power to enact such ordinances was automatically withdrawn by the State and the exclusive power to make such regulations for the City of Mattoon became vested in the Department of Trade and Commerce. The City of Mattoon having been divested of this power by the State, could not by its own action re-acquire such power, but could only regain it by subsequent action on the part of the legislature."

It will be noticed that in the above case the court construed the words "regulatory ordinances upon the subject are in full force and effect" as meaning in effect on July 1, 1919, when the act became effective. A logical construction of such language would require the words "are in full force and effect" to mean "are in full force from time to time". Logically there is no reason for giving greater force and effect to an ordinance in force on July 1, 1919, than one enacted on July 2, 1919. The

fact is that a later ordinance would probably be a better informed effort than an earlier one. Notwithstanding the apparent logic of this consideration, the Illinois Supreme Court gave the ordinance the strictest possible construction in favor of state regulation—in favor of withdrawing from municipalities power which they had had under the general Cities and Villages Act upon which the petitioners in this case place their complete reliance.

Other courts have given saving clauses a narrow construction.

In *State ex rel. Knise et al.* v. *Kinsey*, 314 Mo. 80, 282 S. W. 437 (1925), an original petition for mandamus was filed in the Supreme Court of Missouri to compel the Board of Public Service of the City of St. Louis to issue permits to the relators to sell milk in that city. An ordinance of the city forbade the sale of "raw" or unpasteurized milk within the confines of the municipality.

The State Legislature had also by statute classified and defined various types of milk and milk products and established standards of purity for such dairy products. "Raw" or unpasteurized milk was one of the types of milk thus defined by the statute.

In contending that there was no conflict between the ordinance which prohibited the sale of unpasteurized milk, and the statute which recognized raw milk as a lawful product, the City of St. Louis placed great reliance on Section 8646 of the Missouri statutes which provided:

> "All cities and towns in the state shall have power, by ordinance, to license and regulate milk dairies and the sale of milk, and provide for the inspection thereof."

The relators contended that since "raw" or unpasteurized milk was declared by statute a lawful product

that the City of St. Louis was without power to prohibit its sale, and that the ordinance purporting so to do was void. The Court agreed with this contention and said (pp. 438-439 of 282 S. W.):

". . . This statute shows a very comprehensive plan in defining and specifying different milk products which it may be lawful for persons to deal in. Section 8646, quoted above, relating to cities, of course only authorized such cities to provide for inspection, licenses, and regulations so as to secure conformity to the general statute. The city may enforce such regulations as are reasonable in requiring milk dealers to comply with the law.

"A city has ample power by police regulation to protect the health of its inhabitants, but a municipal police regulation cannot infringe on rights guaranteed by the Constitution or laws of the state. A municipality cannot lawfully forbid what the Legislature has expressly authorized (citing authorities) . . .

"Here clause 1 of the statute of section 11985 defines milk. It is required to be fresh, clean, and come from healthy cows, properly fed and kept. It is not denied that the product so produced and kept is wholesome. . . . It is apparent that the statute has made several classes of milk products, of which raw milk is one and pasteurized milk another. The ordinance under consideration forbids anyone to deal in raw milk, a product which the Legislature authorizes as a lawful product and which admittedly is healthful and harmless. It cannot be contended that pasteurized milk is the milk described in clause 1 of the section, because it is subjected to a process which gives it a different character. Therefore, under the rule of law as stated above, on the face of the ordinance and the statutes, the city had no authority to forbid the dealing in raw milk, and could not lawfully refuse permits to milkmen to sell it. . . . Here is a lawful product, made so by the statute of the state, and the ordinance purports to forbid a citizen his constitutional right to deal in that lawful and harmless product. This does not mean that the city may not make regulations which the statute does

not impose, conditions which insure the purity of the product. The city may require standards of *quality* in the milk dealt in, where the statute makes none. One may violate an ordinance without violating a statute. But the ordinance here is not limited to those regulations. It definitely and distinctly forbids anyone to deal in a product which the statute declares to be lawful."

The petition for mandamus was allowed.

A Connecticut case also shows the extent to which the power of the state over regulation of milk supersedes municipal action.

In *Shelton* v. *City of Shelton;* 111 Conn. 433, 150 Atl. 811 (1930), the plaintiff was a licensed milk dealer doing business in the City of Shelton. The plaintiff had complied with the laws of the state, the rules and regulations of the state milk regulation board and the ordinances of Shelton concerning the production, handling and sale of milk, except one ordinance of that city which provided, in effect, that no milk or cream should be sold at retail within the confines of the municipality unless it had been pasteurized or produced from tuberculin-tested cows.

The charter of Shelton empowered the city to adopt ordinances

> "to license milk dealers and to regulate the sale and manner of distribution of milk and to prohibit the sale thereof, unless in accordance with such regulations."

The city was further authorized, in the same section of the charter, to adopt ordinances with reference to foods

> "and to prohibit the sale thereof when in such condition as to endanger the public health."

Subsequent to the incorporation of the defendant municipality, the General Assembly of Connecticut enacted certain legislation concerning the inspection of dairies and the production, care, handling, marketing and sale of milk and cream and gave the milk regulation board power to make rules and regulations concerning the marketing or sale of milk or cream within the state "to protect the public from the use of milk and cream which is unsanitary or detrimental to public health." The statute recognized five types of milk and made all five lawful provided the statutory regulations were complied with in their production and sale. In addition to pasteurized milk and milk from tuberculin-tested cows, the statute defined and recognized raw milk, grade A milk and certified milk.

A "saving-clause" in the Act provided:

> "No provisions of sections 2485 to 2492 inclusive shall affect the authority of any town, city or borough to enact ordinances or by-laws for the control, regulation, sale or distribution, within its limits, of milk which may be detrimental to public health."

The Supreme Court of Errors of Connecticut, despite the saving clause, found that the ordinance, in forbidding the sale of raw milk, grade A milk and certified milk, each of which was recognized by the statute as a lawful product, was in conflict with the statute and for that reason void. The court, after pointing out that ordinances must not conflict with statutes and must be in harmony with the general law of the state and with its public policy as expressed in its legislation, said (p. 815 of 150 Atl.):

> "Obviously there is nothing in section 2491 [the 'saving clause'] or in section 1 of Chapter 272 of Public Acts of 1929 which gives the city of Shelton the right to prohibit the sale of milk or cream unless it be produced from tuberculin-tested cows or

pasteurized. There is nothing in the section which grants to this city the right to prohibit the sale of raw milk which meets the statutory qualifications, by a producer or dealer who has complied with every provision of the law."

And continuing the court said (p. 816 of 150 Atl.):

" . . . The ordinance converts the permissive use of tuberculin-tested milk or pasteurized milk of the statute into a compulsory one. It prohibits absolutely the sale and hence the use of raw milk, whose use and sale the statute grants conditioned upon compliance with the statutory requirements. The ordinance repeals this statutory grant within the limits of this city. The passage of this ordinance was beyond the powers granted this city.

"The statutes as amended have covered the field of milk legislation, at least so far as the General Assembly purposed, up to the time of the passage of this ordinance. The subject-matter is not an exclusively local condition. To the extent the state legislation has gone, it has pre-empted the field. The defendant under its general grant in section 66 can aid the purposes of this legislation. It cannot override it. It cannot prohibit what the statute grants. It cannot set up new standards in place of the legislative standards. It cannot substitute its judgment for the legislative judgment. It cannot overturn a public policy evidenced in long-continued legislation over a subject state wide in its range and not only intended to conserve the health of people but certainly doing it. . . .

"The statute law recognizes at least five kinds of milk and makes all five lawful provided the statutory provisions are complied with in their production and sale, viz: Raw milk, tuberculin-tested milk, pasteurized milk, grade A milk, and certified milk. The city of Shelton was without power to enact an ordinance prohibiting the sale at retail of any one of these kinds of milk which are authorized by statute. Whether the city could in the exercise of its police power add to these regulatory provisions we have no need to inquire."

The interpretation of the "saving clause" of the Illinois statute by the petitioners is subject to the criticism that it would lead to an unseemly conflict of jurisdiction between the State and the City.

The Illinois Pasteurization Act cannot mean that specific matters shall be subject to determination by both the state and by the city at one and the same time. That would mean chaos in regulation which is not to be attributed to the intention of the legislature and which can be avoided by holding that the City's power is withdrawn by implication in the field actually occupied by the State of Illinois.

In *Village of Atwood* v. *Cincinnati, Indianapolis & W. R. Co.*, 316 Ill. 425 (1925), the question was whether the Public Utilities Act of Illinois repealed by implication the power long before granted to municipalities to require watchmen at railway crossings. The Illinois Supreme Court recognized the rule that "the police power is an attribute of sovereignty and is primarily vested in the General Assembly, which has the right at any time to recall it from the agency to which it has been delegated, and after being recalled to retain it or to confer it upon some other agency or government." (p. 433.)

After finding (p. 430) that the Public Utilities Act gave the Commission the power to require railroads to station flagman at grade crossings, the court held (p. 431):

> "If both the commission and the village authorities can exercise the power, their requirements with reference to the same crossing may be utterly contradictory, for the village board may direct the stationing of a flagman while the commission may order a separation of grades. Obviously, in such cases both cannot be obeyed, and concurrent authority often leads to conflict and results in confusion. The Pub-

lic Utilities act enjoins obedience to the commission's orders. That act is the later one and covers the whole subject of promoting the safety of the public at the intersections of streets and railroads. It is complete in itself and evidently was intended by the General Assembly to supersede the power conferred by subsection 27 of section 1 of article 5 of the general Cities and Villages act to require railroad companies to keep flagmen at street crossings."

The court held that the Public Utilities Act and the power of the village were so clearly inconsistent that both could not stand and that therefore the power of the village was withdrawn and transferred to the Commerce Commission.

It is true that the question in that case was whether there was a repeal by implication of the powers granted to municipalities but what the court said about the conflict of concurrent jurisdiction and about the desirability of avoiding such conflict is very appropriate to the case at bar. The city has argued, and properly so, that Section 19 of the Milk Act is a saving clause not present in the Public Utilities Act. We concede that except to the extent that the state by and pursuant to the 1939 Milk Act occupies the field of milk regulation, the powers of the City of Chicago are unimpaired.

Again, in *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402 (1925), already referred to, where the question was whether the City of Chicago retained its power to require street cars to maintain brightly lighted headlights, the court said (p. 410):

"Did the Public Utilities Act of 1913, which conferred this ample control and supervision over public utilities, including street railroads, deprive municipalities organized under the general Cities and Villages act of the power to pass ordinances requiring street railroads to equip their cars with brightly

> lighted headlights? If both the commission and the city could exercise the same power at the same time with reference to the same subject matter their requirements in respect to the same utility might be utterly contradictory. In such cases the utility could not obey both the commission and the city council. Yet the Public Utilities act enjoined obedience to the commission's orders and prescribed severe penalties for failures to comply. Obviously, concurrent authority would lead to conflict and confusion."

Here, again, the question was whether the conflict between the Cities and Villages Act and the Public Utilities Act was so complete as to indicate that the latter had repealed the former, but the reasoning of the court supports our contention that where the legislature has withdrawn a portion of the city's power and conferred it on a new agency (in our case, the Director of the Department of Health of the State of Illinois) at least to the extent of any conflict between the state and municipal authorities the state governs.

The question may be asked why Section 19 was inserted if conflicts between the State Department of Health and municipalities are to be decided in favor of the state authority. We believe that we have already properly stated the purposes of Section 19, that it was intended to prevent a repeal of all municipal power by implication and to indicate that the Milk Act should supersede the power of municipalities only to the extent that the state had entered the field of milk regulation.

Petitioners contend (Brief, pp. 29-30) that if there is need for both city and state regulations there are *bound to be differences* between them. They instance the failure of the state statute to *require* the date on which the milk is to be sold to be placed on the label. They argue from this that the statute permits the use of undated containers

and *approves* their use so that if our contention be correct the city ordinance prohibiting the use of undated containers is invalid. We make no such contention and the petitioners' argument shows an unwillingness on their part to admit that there is a clear distinction between *supplemental regulations* and *prohibitions*. There is nothing *inconsistent* between the requirement of the state statute that the word "pasteurized" and the name and postoffice address of the pasteurization plant be placed on the label and the city requirement that the permit number of the Chicago Board of Health and the last date on which the contents are to be sold shall be placed on the label (R. 37).

What is actually done is that the information required by both the statute and the ordinance is placed on the label and there is nothing whatever inconsistent in the two requirements. The example given by the petitioners is not comparable to the situation here in which petitioners attempt to prohibit what the state statute recognizes and permits. An analogous instance would occur, however, if the city attempted to forbid the placing of the postoffice address of the pasteurization plant on the label by prescribing a different form of label and making it exclusive.

The failure of the state statute to require that containers be dated is neither an express nor implied approval of undated containers. The references in the statute to single service containers are, however, a definite recognition and approval of them. Furthermore, the grant of power to the Director of Public Health of the state to approve the mechanical equipment for the packaging of milk (Section 15, Item 18 of the 1939 Pasteurization Act, Petitioners' Brief, p. 86) and the Director's specific approval, as agent of the state legislature, of the

plaintiff's equipment for the packaging of milk in single-service containers makes the prohibitory ordinance of Chicago not simply regulatory or supplementary to the state action, but directly in conflict with it.

The Circuit Court of Appeals correctly held:

> "Neither do we agree with defendants' argument that the prohibition of plaintiff's single service container is a mere regulation."

As part of the record in the present case there has been printed (R. 23-122) the milk ordinance of the City of Chicago passed January 4, 1935, the rules and regulations of the Chicago Board of Health, and certain resolutions by the Board of Health. A comparison of the provisions of the ordinance, and particularly the rules and regulations of the Board of Health, with the 1939 Milk Act passed by the legislature, will indicate to what greater extent than the state statute the Chicago city ordinance goes. It provides for licenses both of sellers and their vehicles (R. 33, R. 34), for the display of the license emblem on each vehicle (R. 36), for the revocation of the license (R. 37), for the labeling and placarding of all bottles, cans, packages, and other containers enclosing milk or any milk product (R. 37), for the inspection of dairy farms (R. 39), for the examination of samples (R. 40), and the permissible "plate counts" for bacteria (R. 44), none of which subjects is covered by the state statute. It is obvious that the intention of Section 19 was to preserve to the City the right to continue the ordinances and regulations on those subjects not occupied by the state system of supervision.

The next, and, we think, determinative question, is whether in fact, the state of Illinois has occupied the field of approving types of containers so that any action of the City of Chicago in conflict therewith is void.

We submit that the state has by the Milk Pasteurization Act of 1939 given its approval to paper containers (termed in the Act single-service containers, but at the present time the only single-service containers in commercial use are paper.) As has been seen, Section 4 of the state statute provides for the issuance of a certificate of approval to a pasteurization plant after inspection "if the plant, equipment and methods of operation" are found to comply with the provisions of the Act. It is admitted by the answer (R. 20) that the respondent's plant is at Chemung, McHenry County, Illinois, and the evidence is uncontradicted that respondent is equipped only for the bottling of milk in Pure-Pak paper containers on two machines leased from the Ex-Cell-O Corporation, and the respondent does not have facilities to bottle milk in glass containers (R. 890).

An integral part of its "method of operation," approved by the State of Illinois (R. 695-696) is the packaging of milk in these paper containers. That the method of packaging milk is just as much a part of the method of operation which the Director of the Department of Health of the State of Illinois approved, is clearly indicated by the requirements of Section 8 that all pasteurized milk shall be placed in final delivery containers in the plant in which pasteurized and the provision of Section 15, Item 18, that "bottling or packaging of milk and milk products shall be done at the place of pasteurization *by approved mechanical equipment.*"

The Ex-Cell-O Pure-Pak machine, pictures of which are rather poorly re-produced in the printed record (R. 1469, R. 1498-1501) is equipment adapted solely to the packaging of milk in Pure-Pak paper bottles by means of a mechanical operation whereby that part of the paper bottle coming in contact with the milk is not touched by

human hands at the dairy and before being filled with milk is immersed in a hot paraffin bath, then cooled in the refrigeration unit, and automatically filled, sealed and stapled.

Section 16 (a) of the state statute gives the Department the right to suspend its certificate of approval because of unsanitary conditions of "*milk containers* or equipment." This clearly shows supervision by the State of Illinois of the pasteurization plant, the method of doing business, the equipment, and milk containers, and is an occupation of that field, at least with respect to the approval of the type of container, to the exclusion of the City.

Lest the failure of the Circuit Court of Appeals to cite the case of *City of Rockford* v. *Hey*, 366 Ill. 526 (1937), although called to the attention of that court, be treated as a waiver by us of the applicability of that case, we here expressly rely on it. See our discussion above (pp. 19-21). There the City of Rockford had no power to prohibit the sale of ice cream *in Rockford* by requiring a license and an inspection of a plant outside the city; here the City of Chicago cannot prohibit the sale of milk *in Chicago* by rejecting containers and the corresponding plant equipment which the state has approved outside the city.

We have shown above repeated references in the statute, and the state rules and regulations promulgated pursuant to it, recognizing paper containers, and in view of the approval by the State of Illinois, pursuant to the state statute, of both the pasteurization plant and the method of operation, namely the use of paper containers instead of glass containers, we insist that the State of Illinois has withdrawn from the City of Chicago the right to prohibit (as distinguished from regulate) paper bottles. On

one hand the state approves the pasteurization plant and the type of container and makes it illegal to sell milk in any way except in that container and on the other hand the City of Chicago steps in and says you may not sell in that type of container. The City is not attempting to *regulate* the container approved by the state, but to *prohibit* it, and the decisive question under this heading of our brief is whether a creature of the state, such as the City of Chicago, may challenge the approval by the parent state made pursuant to state law, of a method of operation recognized as entirely lawful by, although not required by, the statute.

We think, under the cases already cited under this heading, the answer is obvious.

Those cases hold clearly that in instances of conflict between state authority and municipal authority, the latter must give away, and we can think of no sharper conflict than the present instance in which the state approves and the city attempts to forbid.

We may ask whether in this particular case an application of this rule will lead to justice or injustice. We submit that it will clearly lead to justice. In this case we have the City of Chicago aligning the *supposed* judgment of fifty aldermen rendered in the year 1935, at a time when these containers were not widely known (and were not used in Chicago or its environs) against the Board of Health of the City of Chicago acting in 1939, the General Assembly of the State of Illinois, (which recognized single-service containers as proper in the 1939 Act), the Director of the Department of Health of the State of Illinois (who has approved the respondent's plant and its method of operation), the United States Public Health Service (which has amended its model ordinance expressly to permit single-service containers), and the practical experience of hundreds of other municipalities.

II.

State Approval of Single Service Containers Is Conclusive that Prohibition of Such Containers by a Municipality Is Unreasonable as a Matter of Fact.

Another line of reasoning leads to the conclusion that the ordinance of the City of Chicago, if construed to prohibit the use of respondent's Pure-Pak bottles, is invalid. Under the law of the State of Illinois, an unreasonable ordinance is void and the question of unreasonableness is a judicial question. This point is not to be confused with a question of constitutionality (*City of Lake View* v. *Tate*, 130 Ill. 247 (1889) at page 252).

In *Chicago and Alton Railroad Co.* v. *City of Carlinville*, 200 Ill. 314 (1902) involving the validity of an ordinance regulating speed of trains, the court said (p. 321):

> "The rule adopted in this State is, that where the ordinance is passed in pursuance of power expressly conferred by the legislature and the details of such municipal legislation are prescribed by the legislature, an ordinance passed in pursuance of such power cannot be held invalid by the courts as being unreasonable; but when the details of such legislation are not prescribed, an ordinance passed in pursuance of such power must be a reasonable exercise thereof or it will be pronounced invalid. (Citing Authorities) It is said in the *Tate* case, on page 242: 'Where the power to legislate on a given subject is conferred and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid.' In *Hawes* v. *City of Chicago*, *supra*, Mr. Justice Baker, in speaking for the court, in discussing the question when a court may rightfully hold an ordinance unreasonable, on page 658 said: 'Where the power to legislate on a given subject is conferred on a municipal corporation, yet if the

details of such legislation are not prescribed by the legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof or it will be pronounced invalid.'"

In *Koy* v. *City of Chicago*, 263 Ill. 122, the court said (p. 127):

"When the legislature has authorized a city council to pass ordinances upon any subject, the power thus conferred must be reasonably exercised. Whether its exercise in a particular case is reasonable is a judicial question, and an unreasonable ordinance will be held void by the courts."

In *City of Chicago* v. *Chicago & North Western Ry. Co.*, 275 Ill. 30 (1916), holding certain provisions of the Chicago Milk ordinance invalid, the court said (p. 38):

"An unreasonable ordinance will be held void by the courts."

The fact that in this case the power of the city concerns a matter of public health does not enlarge its powers.

In *People* v. *Robertson*, 302 Ill. 422 (1922), which determined that the City of Chicago had no power without establishing a board of health, to delegate to the commissioner of health power to promulgate rules to prevent contagious diseases, it was held (p. 432):

"While the powers given to the health authorities are broad and far-reaching they are not without their limitations. As we have said, while the courts will not pass upon the wisdom of the means adopted to restrict and suppress the spread of contagious and infectious diseases, they will interfere if the regulations are arbitrary and unreasonable."

This case also laid down a rule peculiarly applicable to the facts existing in the present case (p. 434):

"One of the important elements in the administration of health and quarantine regulations is a full measure of common sense."

In the very recent case of *City of Mt. Vernon* v. *Julian*, 369 Ill. 447 (1938) dealing with a Sunday closing ordinance, the court, after saying that city councils exercise only delegated and limited powers and that the power to pass an ordinance must be delegated in express terms or be necessarily incidental to an express grant and not simply convenient, stated (p. 449):

> "When the power to legislate on a given subject is conferred and the mode of its exercise is not prescribed in the charter, an ordinance passed pursuant thereto must be a reasonable exercise of that power. *City of Lake View* v. *Tate*, 130 Ill. 247, and authorities therein cited."

These cases go on the well-established rule that the grant of power by the state legislature to a municipality is a grant of power to pass reasonable ordinances and only reasonable ordinances. It is not necessary, in order to prove such an ordinance void, to prove that it is unconstitutional, and so the rule in Illinois is much more favorable to judicial review of municipal action than that of other jurisdictions.

The question before the Court is whether, under existing circumstances, the city should be permitted to enforce its ordinance, assuming that it is to be construed as prohibiting paper containers. The question of its reasonableness must be viewed today, because, as stated in *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402 (1925), (p. 412):

> "The power to enforce proceeds from the present or existing power or authority to enact or to provide. A municipality cannot be said to possess the power to enforce an ordinance concerning a subject upon which it has lost the power to pass the ordinance."

Assuming, therefore, as is contended by the city, that Section 19 of the Milk Pasteurization Act preserves to the

city the right to pass ordinances on the question of milk containers, the preservation of that right is a right to pass or to enforce only a reasonable ordinance on that subject, in view of today's conditions. Since the public policy of the state is that which is declared by the General Assembly, and since the General Assembly and state officers acting under its authority have declared single-service containers proper milk containers, it is palpably unreasonable for the city to attempt to enforce an ordinance absolutely prohibiting them.

The state having declared its policy that single service containers are proper does not mean necessarily that the city has been deprived of the power to regulate them, but we are not talking here of regulation, but of prohibition—a prohibition by a child of the act of its parent, by a ward of the act of its guardian, by a creature of the act of its creator, and by an inferior of the act of its superior. We rely, as indicating the unreasonableness of the enforcement of the Chicago ordinance at this particular time, on all of the cases which we have cited under the preceding point which indicate that the ordinances of a municipality may not violate or be inconsistent with the public policy of the State as declared by the General Assembly—see particularly the quotations set forth above from the following cases:

City of Chicago v. *Union Ice Cream Mfg. Co.*, 252 Ill. 311 (1911).

City of Marengo v. *Rowland*, 263 Ill. 531 (1914).

City of Lewistown v. *Harrison*, 282 Ill. 461 (1918).

We submit that as a simple question of fact—whether or not the prohibition of single-service containers is a reasonable prohibition—the decision must be against the ordinance in view of the approval of this type of container by the sovereign.

It cannot be supposed that the General Assembly of the State of Illinois would approve single-service containers if they presented a health hazard. Its recognition of single-service containers is a declaration by the state that that *type of container* is a proper one. Still bearing in mind that we are not complaining of some *regulation* relating to single-service containers, we contend that under *People* v. *Carolene Products Co.*, 345 Ill. 166 (1931) the enforcement of the ordinance *prohibiting* single-service containers is unconstitutional under the law of Illinois, because not even the legislature has any authority to pronounce the performance of an innocent act criminal. In that case the court said (p. 168):

> "The legislature has no authority to pronounce the performance of an innocent act criminal when the public health, safety, comfort or welfare is not interfered with, (*Gillespie* v. *People*, 188 Ill. 176) and may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations (citing authorities). No question of imitation or fraud is involved in this case and the wholesomeness of carolene is admitted. In *People* v. *Price*, 257 Ill. 587, this court said: 'It may be conceded the legislature has no authority to forbid the sale of a known wholesome article of food.'"

We paraphrase this and submit that the City of Chicago has no legal right to *forbid* the use of a *type* of milk container which the supreme legislative authority of this state has permitted and approved and declared safe and sanitary.

We contend that this is one of the important questions in this case, namely, whether a city which permits the sale of milk and cream at retail in glass bottles has any right to prohibit the sale of milk and cream in paper containers approved by the state legislature and the

state officials; and especially when said container is not shown by a scintilla of evidence or by any experience to be a hazard to public health. We respectfully contend that the Illinois legislature is the paramount authority in expressing the public health policy in this state and that it is unreasonable as a matter of fact for its creature, the City of Chicago, to refuse to recognize and approve that which its creator has approved.

In claiming that the approval of single service containers by the state legislature does not preclude the City of Chicago from prohibiting them, the city relies entirely upon the language of the saving clause in the 1939 statute.

It says that if the city had the power prior to the passage of the statute to prohibit paper milk bottles it must now continue to have that power or the statute will be either "impairing" or "abridging" the power of the city, contrary to the language of the saving clause. Prior to the passage of the 1939 act, the present suit was filed challenging the power of the city to prohibit paper containers, so that the city's assumption that it had such power prior to the passage of the statute is highly debatable and vigorously contested.

But in the midst of this controversy the state legislature of Illinois sanctioned the use of single service containers. If any single one of the highly imaginary fears (pp. 40-69) that the petitioners argue in this Court the City Council of the City of Chicago might consider in excluding paper containers were in any respect real, the state legislature never would have approved single service containers. As already pointed out, under Illinois law not even the legislature of the state has any authority to prohibit the sale of wholesome articles (*People* v. *Caro-*

lene Products Co., 345 Ill. 166 [1931],) and it follows that the City of Chicago itself has no such right.

In the absence of a legislative determination by the General Assembly of the State of Illinois that single service containers were proper containers, it might well be that the presumption of reasonableness would attach to an ordinance of the City of Chicago prohibiting them, but the moment that the state legislature has made its determination then certainly a subordinate legislative body such as the City Council of the City of Chicago is not acting reasonably in ordaining that what the state legislature has found to be wholesome is, in fact, unwholesome, and if the presumption of legislative correctness is to be carried to the limits urged by the petitioners *the presumption should be applied to the sovereign of the state speaking through the General Assembly rather than to the City Council of the City of Chicago.*

Accepting the determination by the General Assembly of the reasonableness of the use of single service containers is not impairing or abridging the power of the City of Chicago for its power never exceeded the power to pass reasonable ordinances. We have already pointed out that under the Illinois law the grant of power by the legislature to the city council is a grant of power to pass reasonable ordinances only.

While admitting (Petitioners' Brief, pp. 69-70) that, in fact, the city council did not have in mind in 1935 any of the items enumerated by the master (R. 1734-1735) upon which "the legislative body may reasonably base its decision", petitioners say (p. 70):

> "Since the question of reasonableness is determined in the light of conditions existing today, we are not concerned here with what the City Council actually did consider before it enacted the ordinance,

but with what it might reasonably have considered assuming conditions to have been as they are today or, rather, with what it might reasonably consider today in the light of today's conditions."

One of today's conditions is the determination by the General Assembly of the State of Illinois in 1939 that there was no danger from single service containers which prevented the legislature from recognizing them as proper containers.

To summarize, the power which the City of Chicago has is the power to pass reasonable ordinances. This arises not out of any constitutional question at all but out of Illinois law which says that the grant of power to a subordinate legislative body by the General Assembly is a grant of power only to pass reasonable ordinances and that the determination of reasonableness is for the judiciary. What might be presumed to be reasonable in 1935 admittedly may not be reasonable today. When the state legislature in 1939 recognized single service containers as proper containers it declared as a matter of state policy that none of the fears about paper containers now expressed by the city had any merit. The presumption of correctness arising from this determination by the state legislature of Illinois overcomes any theoretical presumption of reasonableness attaching to the determination in 1935 by the Chicago City Council that single service containers should be prohibited.

Giving this effect to state action does not "impair" or "abridge" the power of the city. Before the state statute was enacted the city had the power to pass only reasonable ordinances; after the state statute was enacted the city had the power to pass only reasonable ordinances. But in determining the reasonableness of an ordinance which the city now seeks to enforce, the superior deter-

mination of the General Assembly of the state that single service containers may reasonably be used destroys any presumption of legislative correctness in the contrary holding by the Chicago City Council.

Without impairing the power of the City of Chicago, the determination by the state legislature is the determination of the unreasonableness of the attempted enforcement of the city's ordinance which in any court supersedes the presumption of correctness which otherwise might attach to the city's action.

It was undoubtedly this which the Circuit Court of Appeals had in mind when it said:

> "The authorities are uniform that any ordinance which conflicts with any statute *or public policy* adopted by the State Legislature is invalid." (Italics ours.)

and also when it said:

> "The defendants' contention, if sustained, would give the city a broader power than that provided by the Legislature for the state. It would make the state subservient to the city. It would impute to the Legislature the purpose of withdrawing the power theretofore exercised by the city and by the saving clause reconferring such power. We are unable to believe that such an incongruous result was intended."

The approval by the state of single service containers constitutes the best guide for the courts in determining whether as a question of fact the ordinance of the City of Chicago when sought to be enforced in 1939, under conditions existing in 1939 was any longer a reasonable ordinance.

The judgment of the Circuit Court of Appeals should be affirmed.

III.

The Ordinance Is Unreasonable as a Matter of Fact.

[Answering Petitioners' Point II, pp. 34-79.]

Petitioners cite very few Illinois cases on the question of unreasonableness of ordinances even though that question is one strictly of local law. In so far as the Fourteenth Amendment to the Federal Constitution is concerned, the decisions of this Court are, of course, controlling, but in determining whether the ordinance is reasonable under Illinois law, the decisions of the Illinois Supreme Court are controlling.

We have pointed out under the preceding point the Illinois cases holding that there is a distinction in Illinois between unconstitutionality of an ordinance and unreasonableness. The following cases hold that where a general grant of power is made to a city without the details being prescribed by the legislature, an ordinance passed in pursuance of such power must be a reasonable exercise thereof or it will be pronounced invalid:

Chicago & Alton R. R. Co. v. *City of Carlinville*, 200 Ill. 314 (1902) and cases therein cited;

City of Mount Vernon v. *Julian*, 369 Ill. 447, at p. 449 (1938).

We have pointed out under Point II that if due regard is to be given to the legislative determination by the highest legislative body in the State of Illinois, the ordinance passed and sought to be enforced by a subordinate municipality cannot be sustained. In addition, we submit that the evidence in this record and matters of public notoriety, of which the courts should take judicial notice, abundantly and conclusively show in the language of *Koy*

v. *City of Chicago*, 263 Ill. 122 (1914) that the prohibition of paper containers "is so clearly and manifestly wrong that there can be no doubt about it". The rule that an ordinance or any other legislative act is presumed to be valid arises from the fact that the judicial branch of the government must recognize the right of a coordinate branch, the legislative, to determine facts for itself, so that on a merely debatable question the court will not substitute its own judgment for that of the legislative body.

Viewing the present situation realistically, it is fanciful to attribute any actual legislative determination on the question of paper bottles to the City Council of the City of Chicago when, as the *Circuit Court of Appeals* said (R. 1787), that subject was not in their minds at all in 1935. It is a far stretch of the imagination, therefore, to consider the question at bar as having received any legislative determination by the City Council in 1935; and in view of the facts in the record showing that the Board of Health of the City of Chicago made no effort whatever to ascertain the sanitary properties of single-service containers until almost a week after this suit was filed (R. 1003), it is also difficult to see where any real administrative determination was made. The petitioners' plea for attributing correctness to the legislative determination is wholly technical.

Legislatures and city councils in the exercise of the police power may, of course, prohibit all things harmful to health and to the safety and general welfare of society even though the prohibition invades the liberty or property of an individual, but when the articles or things prohibited do not injure the public health or the safety of society, all reason for the prohibition is absent and the

prohibition is not justified, and clearly amounts to confiscation of property and deprivation of liberty in violation of Section 2, Article II of the Illinois Constitution.

Under the laws of the State of Illinois the legislature has no right to prohibit the sale of a known, wholesome article of food and the same consideration would preclude a prohibition of a known, harmless, modern container for milk.

People v. *Carolene Products Co.*, 345 Ill. 166 (1931);

Carolene Products Co. v. *MacLaughlin*, 365 Ill. 62 (1936);

People v. *Price*, 257 Ill. 587 (1913).

In contending that the ordinance is both unreasonable and unconstitutional, we do not overlook the rule of law that innocent acts may sometimes be prohibited where necessary to abate an evil which is a proper subject of the police power. This is not such a case. The evil intended to be remedied by this ordinance is briefly and very clearly stated in the "Public Health Reasons" explaining the purpose of Section 3094 as follows (R. 109):

> "The use of standard milk bottles for delivering milk and milk products in quantities less than one gallon is required in order to prohibit delivery in such containers as buckets, fruit jars, etc., which may be difficult to wash and to subject to adequate bactericidal treatment, which cannot be filled and capped with the proper equipment used for these purposes, and which it is often difficult to label properly."

Conceding for the purpose of this point the right of the City to require liquid milk and cream to be sold in containers, we deny the right of the City to prohibit the use of a container which is not within the object of this section of the ordinance; and which though modern, por-

motes public health and proper sanitation as effectively as the commonly accepted and officially approved containers and which does not lend itself to any of the evils which the City has the power to stamp out.

We submit that the action of the petitioners is arbitrary and unreasonable. Succinctly stated, respondent is denied the right to use its paper milk container to compete with dairies using the out-moded and much abused glass milk bottle. This restriction fosters monopoly rather than protects against it. The restriction discourages competition rather than encourages it. The result of the supposed regulation is not to "regulate" the sale of milk in paper containers, but to prohibit it and actually to preclude persons from engaging in the milk industry in competition with glass bottle dairies.

The evidence shows, as the trial court correctly found (R. 1752) that the use of the paper container creates "no new or unusual health hazard," and "that they are safe and sanitary containers in which milk may be delivered."

The trial court held in substance that in matters affecting public health the law should adopt the best scientific thought of the age. When research and investigation, coupled with vast experience, justify the adoption of new methods without prejudice to public health, it should unhesitatingly be done. Were the rule otherwise, progress would be stifled (R. 1755).

In considering the reasonableness of the ordinance of the City of Chicago as a question of fact we first, of course, have pointed to the approval of single service containers by the state legislature. Next we point to the approval of Pure-Pak paper milk bottles and of the respondent's pasteurization plant by the Department of

Health of the State of Illinois, a fact which is disclosed by the stipulated testimony of Mr. S. V. Layson, Milk Sanitarian of the Department of Public Health of the State of Illinois with offices at Springfield (R. 695). While the court may decide that as a *matter of law* the State Department of Health has no jurisdiction to *compel* the petitioners to permit the use of single-service containers in the City of Chicago, the fact is undisputed that the Department of Public Health of the State of Illinois has approved the Pure-Pak, single service container, and that fact cannot be overlooked in determining whether the action of the City of Chicago, in undertaking to prohibit it is unreasonable or is necessary to protect public health.

In determining whether the petitioners are acting reasonably the Court should also take into consideration the fact that the United States Public Health Service, under the supervision of Dr. Thomas Parran, has approved paper milk containers (R. 1661, 1678, 1699-1704). Concededly, the United States Public Health Service has no plenary jurisdiction in the City of Chicago, but it is admitted by the petitioners that its standards are considered high and are considered safe, so the action of the United States Public Health Service may not be overlooked in determining whether the City of Chicago is acting reasonably in excluding single service containers (Arnold, R. 1165).

The record shows that the Board of Health of the City of Chicago has approved single service containers under the standards laid down by the United States Public Health Service and has recommended an amendment in the ordinance here challenged to permit the sale of milk in single service containers (Bundesen, R. 1211; R. 1698-1704). It is true that the Board of Health has no power

to change an ordinance and that its recommendation is not binding either upon the petitioners or upon the Court, but in determining whether the petitioners are acting reasonably in excluding single service containers, the action of the Chicago Board of Health cannot be overlooked.

Next, in determining whether the City of Chicago is acting reasonably, weight must be given to the experience of other cities where the use of single service containers has been permitted and where there is not the slightest suspicion that they have created or tended to create any health hazard. We are here not referring to the fact that the municipalities which have permitted the use of Pure-Pak containers are great in number on the theory of counting noses (as the petitioners seem to think) but that the favorable results of the use of the container in those municipalities may not be overlooked in deciding whether the City of Chicago is acting reasonably in the present case. (Furthermore, this evidence was admissible to show how widespread was the use of these paper bottles to prove that they were standard bottles.)

The evidence proves that respondent is and has been engaged in the sale of wholesome milk and milk products in the State of Illinois and sells its products in these containers in suburban communities in Cook, DuPage and Lake Counties without interference. This had been done daily for almost two years before the trial court's decision with no consequent injury to public health. These experiences were persuasive to the trial court; and obviously, if these experiences in the use of paper containers had disclosed any health hazards, petitioners most certainly would have presented proof of this fact by competent evidence, and not relied on mere theory and conjecture.

We contend that it can be safely and logically assumed that the milk consumers in Evanston, Winnetka and Oak Park and sixty-five other communities in and about Chicago are no less susceptible to disease than are the residents of Chicago. There is nothing peculiar about these milk consumers which distinguishes them from Chicago citizens. This argument applies with equal force to the residents and milk consumers in Washington, Detroit, New York City, Boston and Philadelphia and hundreds of other cities and villages which use paper containers daily. Geographical location does not result in new and peculiar health hazards reasonably related to milk containers.

No reason is advanced, and no evidence was offered, to sustain the theory of the city that peculiar local conditions exist in the City of Chicago which prevent the court from considering the satisfactory experience of hundreds of other communities in using paper milk bottles. Millions of quarts of milk in paper bottles are being sold daily in Illinois and to army camps throughout the United States (12,000 quarts daily are sold to Camp Grant, Rockford, Illinois, by respondent), without suggestion of ill-effect.

That the city has no real fear of the evils which it argues the city council might consider in prohibiting paper milk containers is proved by the fact that since the date of the decision of this case by the District Court, October 18, 1940, the city has permitted millions of paper containers which are not protected by any injunction of any court—state or Federal—to be used freely in the City of Chicago. No harm has resulted from the use of such other containers or from the distribution of milk in plaintiff's containers under the protection of the present injunction and the fact that the petitioners

have voluntarily permitted the use of these other containers is eloquent proof that petitioners well know that no public health hazard is actually involved.

Another fact which ought not to be overlooked in deciding whether the prohibition of paper milk containers is reasonable, is the universal use of paper containers daily for liquid foods of all types. The point here is not that the articles and uses are so similar that the City may not permit one without the other, but that the widespread use of paper containers stamps as unreasonable when treated as a matter of fact and not as a matter of law, the action of the petitioners in prohibiting paper milk containers.

The City stipulated that it permits the use of single-service paper containers for liquid coffee, soft drinks, and ice cream sold by drug stores and restaurants without restriction, inspection or regulation (R. 694). This is an administrative decision which proves that they are not a health hazard. Such containers are related to the public health of the inhabitants of the city and are used daily by practically all citizens of the city in consuming food and drink. Infants, the aged and convalescents are permitted to partake of ice cream dispensed in paper containers over which the Board of Health exercises no supervision.

Fiber-board pails, ice cream cartons, drinking cups, tall paper tumblers and other articles of paper too numerous to mention which are much more lightly paraffined than are Pure-Pak containers have been used for years and are still being used in Chicago without inspection and, most significant of all, with the acceptance by the common man that there is nothing more sanitary than a single-service paper container.

It was stipulated that paper containers were permitted without objection by the Board of Health and without

any test to determine the sanitary quality of the paper used for the sale of ice cream, butter, lard, cottage cheese, other kinds of cheese, oysters, pickles, soft drinks and liquid coffee; that ice cream is sold in metal cans with a thin paraffined paper liner between the ice cream and the container; that paraffined paper is permitted to be placed across the top of metal milk cans underneath the metal cover of such cans; that paraffined drinking cups and paraffined paper straws are used in the City of Chicago, and that paraffined paper liners for dishes in which ice cream is served are also used, all without objection or regulation by the Board of Health (Stipulation, R. 694).

The common man's acceptance as a truism that paper containers are sanitary is a better guide to the truth than are learned theories of the experts, real or pretended. It leads inevitably to the conclusion that paper milk containers are sanitary. The trial court considered all of this evidence and came to the conclusion that no health hazard was presented.

Lastly, in determining whether the City of Chicago is acting reasonably, we think the Court should give careful consideration to the evidence before it in this case proving that the single service container in question has not at any place or at any time been even suspected of constituting a health hazard.

We now turn to the specific arguments advanced by the city in support of its theory that the prohibition of paper containers is reasonable.

Sanitation and Absorption.

[Answer to Point II-(b)-2; Petitioners' Brief, pp. 44-51.]

It is argued that paper milk bottles are rightfully prohibited because the container board absorbs a few drops of milk. It is argued by the city that this factor "is of utmost significance." (p. 48). Yet the petitioners do not point out, nor does the record show in any respect, that a public health hazard exists merely because a few drops of milk might be absorbed in the corners of a paper milk bottle. There is no evidence in the record that anyone ever became ill or infected, or was likely to become so, by reason of a few drops of milk absorbed by the paper board. No witness heard of any such experience, not even Dr. Arnold, petitioners' main expert witness. On the other hand, petitioners champion the glass bottle which the evidence and common knowledge show is used over and over by milk containers, different ones daily, many times; and which multi-used glass bottle is exposed daily on the house door-step, subject to contamination by contact with all the domestic animals about the home or neighborhood, ordinary exposure to the weather, irritants in the air, breakage and leakage, in hot or cold weather. In freezing weather it is common knowledge that the cream is expelled out of the mouth of the bottle and exposed to contamination on the door-step, window-sill, rear porch or the other usual depositories for glass milk bottles. Petitioners' argument that the absorbency of paper milk bottles is of "the utmost significance" fails because of the absence of proof that such absorbency ever caused or might cause any illness or disease. The proof of the pudding is in the eating. The argument of petitioners is based on pure theory. There is no danger in paper bottles compared to paper

caps made of the same material and permitted by the city to be used on glass milk bottles. These caps permit absorption of milk and they are taken off in common use and exposed to the bacteria and the irritants in the air and afterwards replaced on the bottle with the bacteria on the inside. This may easily contaminate the contents of the bottle. The imperfect washing process on the glass bottle and haphazard inspection of glass bottles by the petitioners (1400 bottles being inspected over a period of a year when 365,000,000 quarts of milk are sold in glass bottles in the City of Chicago) offers slight support to the petitioners' efforts to discredit the single service paper milk bottle on the absorption issue (R. 986 to 996).

If the absorbency argument now advanced by the defendants has any plausibility the Illinois Legislature adjudged it to be of slight significance.

The State of Illinois has repudiated absorbency as a reason for prohibiting paper containers, for Item 5 (e) of the minimum requirements promulgated by the Director of the Department of Health, (above, pages 28-29) provides only that "all single-service containers shall be so treated as to be as impervious to milk *as practicable*," thus recognizing the impracticability of making them entirely impervious. This policy of the state controls the action of the City of Chicago.

Dr. John W. Rice of Bucknell University, Lewisburg, Pa., found the paper bottle superior to the glass bottle in abating the spread of infectious diseases because of its high inherent sanitary quality (R. 406-7; 424). His research work and experience disclosed that the bacteria found in the paper board were not pathogenic. He never found any pathogenic bacteria on any paper board used in paper milk bottles (R. 411). In his opinion, supported by research, absorption of milk in the paper board

presented no health problem (R. 425). This witness was requested to testify by the defendants and his time and expenses were paid by the city.

Dr. John R. Sanborn of the New York State Agricultural Experiment Station, Geneva, N. Y., testified positively that the absorption item was insignificant (R. 286, 289-290) and the disintegration test furnished an index to the sanitary condition of the manufacture of paper containers. This being true, all reasonable and necessary safeguards exist in the matter of bacteriological control and thus the absorption argument loses all force.

Mr. M. J. Woodman of the Evanston, Illinois, health department, testified that in his experience disintegration tests offered adequate protection at all times and his experiments showed that the empty paper container was essentially free of bacteria in 300 to 400 tests (R. 680).

Dr. M. J. Prucha of the University of Illinois, testified that after two and one-half years of research, study and experience he found the absorption by paper caps used in glass milk bottles greater, relatively, than by Pure-Pak containers because of lighter paraffining (R. 716), but testified that even the absorption by the paper cap presented no health hazard (R. 659).

Dr. Paul H. Tracy of the University of Illinois, after two and one half years of study, experiments and experience, found that the absorption of milk into the paper board presented no health problem whatsoever (R. 510).

H. M. Packer of the Philadelphia Health Department, with years of experience in Philadelphia, where milk has been sold in paper containers for many years, found no objection to the use of the paper bottle by reason of any absorption (R. 1363, 1364).

Dr. E. H. Yunker of Philadelphia, with considerable

practical experience in the use of the paper milk bottle, was of the same opinion (R. 1387).

The City's effort to capitalize on the absorption issue finds no support from practical experience. As the case takes final form, this appears to be the chief reliance of the defendants. All the expert witnesses in this case (except Dr. Arnold) were unanimous that health authorities possessed as adequate bacteriological control over paper milk bottles as they had over glass bottles.

We respectfully submit that the City's argument on the absorption issue has no merit whatever when considered in the light of wide practical experience for years. The container has had sufficient use in hundreds of cities and villages daily so that if absorption presented any hazard to public health, the City would have readily presented such evidence. Not one witness was produced by the City to testify to any fact supporting this academic objection.

It is conceded that absorbency is material only because of fear of contamination from the milk container board, yet Dr. Arnold testified that he had never found pathogenic bacteria on milk container board (R. 1148).

Dr. Arnold also testified (R. 1165) that the model ordinance and code of the United States Public Health Service were generally considered a reasonable and safe standard for milk sanitation (R. 1165). Surely, since this service recommends the use of single-service containers and approves them in its model milk ordinance, the absorption of a few drops of milk now complained about by the City is no real detriment. The present universal recognition of the merits of single service containers in spite of some slight insignificant absorbency, and the fact that there is no suspicion that this absorbency has ever, anywhere, at any time, constituted a menace to health is a complete

answer to the City's present argument. Practical experience is more potent proof than mere speculation.

Paraffin Used on Paper Containers.

[Answer to Point II-(b)-3; Petitioner's Brief, pp. 51-53.]

The City contends that because a small particle of paraffin might get into the milk, the containers must be denied use by the City.

Dr. Robert A. Black, a member of the Chicago Board of Health, testified (R. 1226), that he knew "nothing in way of proof on either side" with regard to the sanitary aspects of the single-service container, and when asked regarding the merit or demerit of milk containing paraffin being fed to infant babies, he said he would not want infants in his care to have milk containing paraffin. He further said (R. 1228) that paraffin was, in his opinion, inert and that it was a by-product of oil. He further testified that he never read or heard of a case of a baby being fed paraffin in milk which came from single-service paper milk bottles and that feeding oil to children to secure an evacuation of the bowels, in his opinion, "does not give any bad effects" (R. 1228). He further said he never made any inquiry nor had any information with regard to this suggested health hazard nor was inquiry made in communities and from officials in places where paper milk bottles were used (R. 1225-30).

Dr. Lloyd Arnold had a theory that the "spicules" would injure the intestinal tract, but he forgot that spicules, if any existed, were dissolved in the milk, which was heated when fed to babies, and he, too, never heard or knew of a case of a baby being injured or of its intestinal tract being irritated by reason of drinking milk from paper milk bottles (R. 1113-15). This is in sum and

substance a frank presentation of the evidence offered by the City on this issue. We submit that there is nothing in this type of testimony which presents any genuine objection to the use of paper milk bottles. Conjecture and surmise do not rebut years of experience in the use of millions of paper milk bottles daily throughout hundreds of cities and villages in the United States and elsewhere. *If there were any meritorious objection to the use of paraffin on paper milk bottles, the health officials in the hundreds of cities and villages using paper milk bottles daily, including the City of Chicago at the present time, would certainly know of it and have proof of it by now;* and the City would most certainly have offered some testimony to support the objection it now makes.

Paraffin is a wholesome product, and when applied to the paper milk bottle affords additional protection to the bottle and in no manner does injury to health. The City did not produce one witness who had any real information or data to prove to the contrary.

Dr. Arnold testified that he had never heard of any child being made ill by swallowing paraffin (R. 1172) and that he never knew, heard or read of any child or aged person having spicules of paraffin in their intestinal tracts (R. 1172-1173).

It is, in fact, a matter of common knowledge that paraffin is not harmful to health. It is commonly used by the housewife on her jellies and at one time or another has probably been chewed by every school boy.

Dr. William D. McNally, for 17 years coroner's toxicologist of Cook County, Illinois, and one of the outstanding toxicologists in this section of the country, testified that paraffin is not a poison either to adults or infants, that there is nothing about its chemistry which is harmful to human health, either adult or infant, that if

the taking of paraffin were to cause disturbance to the human body that would be the type of case that would come to him professionally; that he was familiar with medical literature generally and that he knew of no instance, either in literature or from his own experience or from consultation with physicians or from any source, where bodily disturbances of any kind were attributed to or suspected of being caused by accidental or other taking of paraffin; that the witness himself had chewed paraffin and that he had seen numbers of other persons who had chewed paraffin and undoubtedly swallowed particles larger than 100 milligrams without any ill effect (R. 1262-1264). He stated that large particles of paraffin might act as an irritant to a person with an inflamed bowel, but that he could not conceive of such particles coming from a Pure-Pak container (R. 1265). Paraffin is an un-nutrient medium for bacteria (R. 1266). Bacteria do not penetrate paraffin, and this is the reason that housewives use it for jams and jellies because it prevents the bacteria and yeasts from entering them. A piece of paraffin twice the size of a kernel of wheat might be irritating, but if it was in very small particles it would not be (R. 1296).

Dr. Tracy of the University of Illinois gave similar testimony (R. 481). He stated that paraffin was used by his mother in his boyhood and that in modern times it is being used in treating all types of waxed papers, such as cheese boxes, butter boxes, milk bottle caps and drinking cups and that they used to make chewing gum out of it (R. 481-482). He testified that the chipping off of slivers of paraffin presented no health problem (R. 529-530), and that no disease had ever been traced to paraffin in the operation of the University dairy (R. 503).

Dr. Sanborn testified that in his opinion the paraffining

process is free from public health hazard, that there is nothing in the paraffin that is detrimental to the properties of Grade A milk put into a container, that in his opinion and experience it would not change the taste of the milk or cause any odor to get into the milk (R. 178). He testified that there was nothing in the oily substance of paraffin that was dangerous to health (R. 295).

Dr. Prucha testified that he tested paraffin in the paraffin bath of an Ex-Cell-O machine and could not find any bacteria. The samples were taken under usual working conditions at the plant (R. 651).

Dr. Rice testified that the paraffin presented no health hazard (R. 413) and other witnesses testified to the harmless nature of paraffin (Packer, R. 1363; Vaughn, R. 1305).

The General Assembly of the State of Illinois and the State Department of Health have approved of the use of single-service paper milk bottles which are coated with paraffin and have declared them proper.

Petitioners rely (Brief, p. 53) on the *Criminal Code*, Illinois Revised Statutes, 1939, c. 38, par. 14. It is apparent from reading the criminal statute that it has no application herein and that the remote possibility of small quantities of paraffin getting in the milk is not an adulteration denounced by that statute, because the slight possibility of minute particles or spicules of paraffin getting into milk is not an adulteration of milk. It surely cannot be said that the Illinois Legislature, in recognizing and approving paper milk bottles, and the Director of the Department of Health of Illinois and the United States Public Health Service in approving their use and providing minimum requirements for their use, would countenance any adulteration of milk.

Odors From Paraffin

[Answer to Point II-(b)-4, Petitioners' Brief, pp. 53-56.]

The brief of the petitioners states: "It is a well-known fact that milk rapidly absorbs odors to which it is exposed" (p. 53). From this they conclude that paper milk containers *may conceivably* impart odors from paraffin or from bacteria to the milk and may therefore be prohibited. It is highly significant that although the general fact of "ready absorption" is claimed, the city offered no evidence whatsoever of odors ever getting into the milk, either from paraffin (oxidized or not) or from bacteria.

Dr. Sanborn, who is quoted at length on pages 54 and 55 of the petitioners' brief, testified *affirmatively* that there was no evidence that paraffin had ever changed the taste of milk (R. 294-295). Dr. Tracy testified that one of the first tests made at the University of Illinois was to determine whether paraffined paper bottles imparted a taste to the milk and he found that the paraffined paper bottles had no effect upon the flavor of milk (R. 494) and further said that paraffin had no flavor (R. 494-497). The flavor of milk in glass bottles was changed when exposed to light (R. 494-497).

There is not one witness or a particle of evidence in this record proving or tending to prove that rancid odors or any unpleasant odors have come from paraffin used on paper milk bottles. Elaborate effort is made to support this theory of defense by referring to the testimony of Dr. Sanborn, who frankly admitted that paraffin heated at high temperature would oxidize. Dr. Sanborn did not know what these temperatures were but stated that high temperatures coupled with stale and uncleaned paraffin bath chamber for three weeks would produce "off" odors (R. 304). This proves nothing. There is no evidence

that anyone in using paper milk bottles ever experienced off odors by reason of the oxidation of paraffin.

Petitioners refuse frankly to face the facts shown by the uncontradicted testimony of the witnesses, Howard R. Peterson (R. 942-45) and Paul V. Keyser (R. 1334-1355). The latter testified that no oxidation will occur in paraffin below its melting point, which is 125° F. to 130° F. (R. 1347). As paper milk bottles are not exposed in the home or anywhere else to temperatures of from 125 degrees to 130 degrees F. oxidation could not occur after the paraffining process had been completed at the dairy.

Howard R. Peterson whose experience and experiments with paraffin used on paper containers are wholly uncontradicted and unimpeached testified that in the bottling operation paraffin at 210 degrees F. would not oxidize for twenty hours (Peterson, R. 943, 958-959). This is a higher temperature than is ever reached in the use of the Pure-Pak machine (Prucha, R. 711-712). The temperature coefficient of oxidation of paraffin is fifteen degrees, so that at 195 degrees F. the initial resistance to oxidation is forty hours; at 180 degrees F. is eighty hours and at 165 degrees F. is 160 hours (Peterson, R. 943-944). The Pure-Pak machine consumes about 30 pounds of paraffin per thousand containers (Peterson, R. 955, 957; Dean, R. 961), has a capacity of 110 pounds of paraffin wax (Dean, R. 960), and coats between 1500 to 2000 containers per hour (Dean, R. 960; Peterson, R. 947) and the factor of safety against oxidation is from 400% to 500% (Peterson, R. 944-945).

It is undisputed that oxidized paraffin is rancid in odor and easily detected (Sanborn, R. 304; Peterson, R. 956). It also changes color (Sanborn, R. 304). It is undisputed that the Pure-Pak machine in operation gives off no

rancid odor (Dean, R. 965; Peterson, R. 952, 955-956). Dr. Arnold witnessed the machine in operation in the Risdon Dairy, Detroit, Michigan, for several hours (R. 1160) while gathering data for Plaintiff's Exhibit 4, a report dated December 4, 1937 favorable to paper containers, which see (R. 1397), and he did not recall any rancid odor (R. 1163). He testified that paraffin in its natural state is odorless (R. 1163).

Dr. Arnold also testified that he had never heard of anyone becoming ill from the oxidation of paraffin (R. 1179). There is no testimony either that the weak organic acids resulting from the oxidation of paraffin have any ill effects, or that paraffin used on milk containers has ever oxidized, or that milk has ever received an odor from paraffin, and the fact that oxidation of paraffin can be detected by simply smelling the container as Dr. Sanborn did at the hearing is ample protection against any imaginary danger that the City fears.

So much for the manufacturing process and its lack of possibility of oxidation. When filled with milk, it would take hundreds of hours in the blazing sun to oxidize the paraffin on the container (R. 966). So the possibility of oxidation there disappears.

The tests of Dr. Rice on the odor of bacteria mentioned on page 56 of petitioners' brief were not on Cherry River board used in Pure-Pak containers (R. 416, 431-432). He got the same odors from milk bottle caps (R. 416-417). These odors came from the bacteria (R. 416), and the problem presented by odors from bacteria on paper bottles is, therefore, no different than that presented by odors from bacteria on glass bottles or on paper caps used on glass bottles. The language of the witness was very picturesque and the City cannot be blamed for making the most of it, but the fact remains that the problem

has nothing more to do with paper bottles than it has to do with glass bottles. The witness originally embarked on these experiments only to test paper caps for glass bottles (R. 415).

That the possibility of odors from bacteria is not a problem of paper containers any more than of glass containers is clear from the testimony of this witness, that as a bacteriologist he considered paper containers now in a state of freedom from bacteria justifying their use for milk and cream (R. 412) and that paper bottles are superior to glass bottles (R. 406-407, 424).

The final statement of petitioners (brief, p. 56) that it is not unreasonable "to prohibit the delivery of milk in containers that impart an odor to milk" implies that there was evidence that odors had been thus imparted to milk by paper containers. There is no evidence whatever of this in the record. The absence of all evidence of odor being transmitted to milk by paraffined paper containers is the complete answer to the city's argument under this point.

The Sanitary Control of Paper Containers.

[Answer to Petitioners' Point II-(b)-5; Petitioners' Brief, pp. 56-67.]

In petitioners' brief, petitioners argue that because the paper mills and the converting plants in which the paper is formed into printed "blanks" are located outside of the city, there is an absence of adequate sanitary control over the containers and the city may reasonably exclude them because the city cannot be forced to go outside of the municipality to examine the mills and plants.

If this argument is sound, every article of paper which is used as a food container in the City of Chicago is sub-

ject to the very same objection. It is true that in order to produce a sanitary paper milk board the conditions in the mill and in the converting plant must be sanitary, but the testimony is uncontradicted, forceful and persuasive that the mere passage of time is a great purifier, particularly with respect to the harmful type of bacteria, so that when the flat blanks are received at the dairy the passage of time has itself acted as a purifying factor (Prucha, R. 702-703; Plff's. Ex. 46, R. 1572). While Dr. Arnold, the City's witness, disagreed to some extent with Dr. Prucha's conclusions as to that, he had conducted no complete experiments to determine the time that bacteria survived and he stated that it was a fact that the number of live bacteria on paper board decreases with time (R. 1174) and that in his opinion Dr. Prucha's experiments on self-purification of paper were neither false nor misleading (R. 1176).

Dr. Arnold's objection to inspection of paper containers without going to the mill is that otherwise he would not know where the paper came from (R. 1119, 1146-1147). This does not differ in any detail from the situation of a glass bottle, which may have just come back from the city dump. The source of the bacteria disclosed by a rinse test on a glass bottle is no more certain than the source of the bacteria on a paper bottle, but common sense should tell us that in the case of the glass bottle, the chance of the bacteria being human bacteria is much greater than in the case of the paper bottle. Furthermore, one glass bottle which is contaminated can contaminate others in the common washing process, whereas one contaminated paper bottle (there being no evidence in the record of any such contamination) will not contaminate any others.

Turning to practical milk sanitarians whose testimony is preferable to that of mere theorists, we refer to the testi-

mony of *Dr. Fred O. Tonney*, formerly connected with the Chicago Board of Health for many years and a man thoroughly familiar with both the glass bottle and the paper bottle operations, who testified that he saw no necessity for visiting paper mills (R. 915), that he considered the disintegration test on a paper bottle a more severe test than the rinse test employed on glass bottles by the Board of Health (R. 914), and that he considered the standard rinse test for milk containers equally applicable to glass and to paper from a sanitary standpoint and from a public health standpoint (R. 913).

Dr. H. A. Orris, in charge of milk control for a number of Chicago suburbs where Pure-Pak paper milk bottles have been in use now for more than three years and at the time of his testimony had been in use approximately a year, testified that the control of paper containers was at least equal to the control over glass bottles (R. 572-573), that tests of milk sold in paper containers were satisfactory (R. 575) and that empty paper bottles taken at random, off the line unfilled, had been tested by the rinse test regularly and satisfactorily (R. 575). He receives reports from Dr. Jordan of the American Public Health Association of the quality of the paper board and he has never had any occasion to doubt those reports (R. 576), but if he ever did have a doubt he could easily make a disintegration test in his own laboratory as he has the paraphernalia for it (R. 576). He stated that he would prefer, instead of going to the mill, to take the paper board from the container as it was on the filling line at the dairy (R. 576). He testified that he could check immediately the authenticity or genuineness of reports received and that if he found something wrong with the paper bottle he could stop the use of it in exactly the same way that he does with the glass bottle (R. 595). When asked point-blank:

"Have you had any less control over the paper bottle than you have over the glass bottle?" he answered, "I don't think so." He stated that he had not found any problems in the use of paper containers since November, 1938, in performing tests and research work, of which he felt he did not have absolute control (R. 600).

Mr. M. J. Woodman of the Evanston, Illinois, Health Department, testified that he had never had occasion to go to the paper mill or fabricating plant, that he never considered it necessary; and further, that if he needed to make a test of the paper bottle he could do it very quickly in the laboratory (R. 675-676).

Dr. John R. Sanborn testified that a disintegration test made in the City of Chicago on a carton after it had been sent to the dairy would disclose whether or not that carton was then in a sanitary condition (R. 266), that a disintegration test would give an absolute test whether or not that particular carton was sterile or contaminated and that by picking at random cartons of that kind at the milk plant the public health authorities of the City of Chicago could determine whether or not the cartons being used were sterile or contaminated (R. 267). The cost of the apparatus for performing the disintegration test is $20.00 to $30.00 (Sanborn, R. 266).

Dr. M. J. Prucha of the University of Illinois, testified that the rinse test and the disintegration test on paper containers gave public health authorities adequate and sufficient bacteriological control over the single service container (R. 819). In his opinion, it was not necessary to go to the mill (R. 722). Comparing the tests, for ascertaining the sanitary condition of the glass bottle and the disintegration test and rinse test on the paper container, he testified that he was of the opinion that public health

would now be preserved without any certified list of mills such as he had mentioned in his testimony and in some of his previous writings (R. 833-834). He testified that by his bacteria counts on paper board he could determine whether it would be fit to be used for milk containers (R. 838).

As to detecting the presence of re-used material instead of virgin spruce for the container board, it is undisputed that it may easily be detected (Arnold, R. 1168-1169; Packer, R. 1376).

The City's contention that it cannot supervise paper milk bottles unless it sends inspectors to the paper mills and converting plants where the containers are manufactured wholly disappears upon a consideration of the evidence. It is true that Dr. Prucha of the University of Illinois and Dr. Sanborn of the New York State Agricultural Experiment Station considered it necessary *for their purposes* to examine the paper-making and converting process. One becoming an outstanding expert in this field would naturally start at the beginning. They, however, have furnished their evidence, and their testimony shows clearly that local health authorities need not go to the mills before approving paper containers.

Health officers in the ten North Shore suburbs about Chicago and health officers in Philadelphia saw no need to go to the mills to satisfy themselves of the sanitary properties of the products. Why should Chicago? Public health administration is—or should be—a matter of common sense. The evidence is undisputed that the public health authorities have just as much control over the sanitation of the paper milk container after it reaches the confines of the City of Chicago where it is subject to physical and chemical tests as they have over glass milk bottles, milk itself, or any one of thousands of food

products and food containers manufactured outside of the city and brought there for sale.

There is no more justification for prohibiting the use of paper containers for milk because the City did not see the paper manufactured than there would be for prohibiting glass milk bottles merely because the health inspector cannot follow every glass bottle around on its numerous trips to the store, customer, garbage can, city dump, milk dealers' bottle exchange and thence back to the dairy and to the customer again.

What in the latter situation does the City do? It takes reasonable precaution to see that the bottles of known bad origin (dump and junk yards) are sterilized and that all bottles are washed in chlorine solution so that tests at random (1,400 per year out of more than a hundred million glass bottles delivered yearly—R. 986) seem to indicate that reasonably sanitary results are being obtained.

The mere fact that it is physically possible to subject paper milk bottles to the higher standard of tracing them to their source for every delivery (since each delivery is a single service) does not reasonably justify imposing a requirement that each source be checked as a condition precedent to the use of the paper bottle any more than it would be reasonable to require that glass milk bottles be traced from the dairy back to the Milk Bottle Exchange and again to the dairy before being reused.

Transparency and Cream Line in Paper Containers.

[Answer to Point II-(b)-6; Petitioners' Brief, pp. 67-69.]

Petitioners seek to justify the exclusion of paper milk bottles because they are not transparent, so that the cream line is not observable and because cream does not

rise to the top in a paper bottle as it does in a glass bottle. It was stipulated (R. 1332) that homogenized milk is sold daily in the City of Chicago without any objection from the petitioners. The very definition of this milk prevents the showing of a cream line. It is permitted by the same statute that we rely on in this case as a protection to our right to sell milk in paper bottles.

The state statute under consideration defines homogenized milk as follows (Ill. R. S. 1941 c. 56½, "Foods", Para. 115, subpara. 4):

> "Pasteurized homogenized milk is milk that has been mechanically treated in such manner as to alter its physical properties with particular reference to the condition and appearance of the fat globules, to such an extent that no visible cream separation occurs after 48 hours storage and fat tests of the milk at the top and bottom of a quart bottle do not show a difference in fat percentage exceeding two-tenths of one per cent (0.2%)."

No reason exists for permitting homogenized milk in glass bottles which do not show a cream line and prohibiting Grade A milk in paper bottles which do not show a cream line. There is no evidence in the record showing that the non-transparency of the paper bottle affects public health or perpetrates a fraud on the milk consuming public. It is universally agreed by all milk sanitarians and public health experts that the cream content is easily ascertained by performing the Babcock test on milk whenever desired (Tracy, R. 503; Orvis, R. 573). There is no evidence that plaintiff's milk in paper milk bottles does not have sufficient cream or fat content. Obviously, there is no requirement in the ordinance and can be none prohibiting the public from purchasing milk with cream diffused throughout as in homogenized milk permitted by statute. They may buy it in glass bottles if they want

the cream concentrated or in paper bottles if they desire that the cream be diffused, as in homogenized milk.

Section 3094 of the ordinance requiring "standard milk bottles" was designed to procure sanitary containers for milk. There is nothing in Section 3094 or the "public health reasons" for its enactment (R. 109) having any relation to the transparency of paper bottles or the cream line. This section is not an ordinance on weights and measures, nor was it enacted to regulate cream lines.

The "standard milk bottle" even if of glass, may have a long narrow neck as shown by some of the milk bottles in Plaintiff's Exhibits 13 and 14 (R. 1493-1495), and this mislead the purchaser to think he is getting lots of cream when he is obtaining very little. Furthermore, the cream line does not necessarily determine the amount of butterfat in particular milk (Orvis, R. 573).

The petitioners' argument on this issue wholly ignores the fact that *permitting* the use of paper milk bottles does not *compel* a single person in Chicago to buy milk in them if he desires a transparent bottle. This is the buyer's privilege and election. If he does not want the whole milk and wants to pour off the cream he may buy his milk in glass. Granting him that privilege does not, however, under any rule of reason or under public health principles justify depriving plaintiff of the right to sell milk in paper bottles, nor does it justify depriving customers of their right to purchase milk in paper containers. Whether the cream concentrates is meaningless from a public health standpoint. The significant thing is that there is sufficient butterfat to meet the requirements, easily determined by routine tests.

There is nothing in any of the provisions of the ordinance or the public health reasons for its enactment requiring transparency of a "sanitary dispenser", bottle or

container for milk. There is not a scintilla of evidence in the record which shows or even tends to show that it is necessary or desirable from a public health standpoint that milk bottles be transparent.

On the other hand, there is affirmative evidence that the transparency of the glass milk bottle is a decided disadvantage from the standpoint of the taste of the milk. The paper bottle shuts out rays of the sun which give milk in glass bottles which are exposed to the sun a bad taste because of the sun's action on proteins in the milk (Tracy, R. 494-495). Dr. Tracy further testified that paper is a better insulator against heat than glass is, resulting in maintenance of the coolness of bottled milk longer in paper than in glass (R. 497). This is shown by actual tests and is of great importance because low bacteria counts in milk depend almost entirely upon maintaining the milk at low temperatures which are unfavorable for the multiplication of bacteria.

Condensed milk and other liquids and food products of all kinds are permitted to be sold in tin cans even though the City does not have the same opportunity to inspect the plant in which they are canned as it has in the case of respondent's milk plant, and it is clearly unreasonable to prohibit plaintiff's container on the ground that it is not transparent.

The approval by the State and by the City of Chicago of homogenized milk which by its very definition has no cream line eliminates the absence of a cream line as a proper ground of prohibiting paper containers.

Pacific States Box & Basket Co. v. *White,* 296 U. S. 176 (1935), cited by the City at page 67 of its Brief, has no relation to this item of transparency of milk bottles. The case of *Koy* v. *City of Chicago,* 263 Ill. 122, cited by the City on page 68 of its Brief, holding that

laws may provide the manner in which purity, wholesomeness and freedom from disease shall be secured and "made to appear" does not warrant the city's compelling transparent bottles in order to show a cream line when the sovereign state has approved single-service containers and has approved homogenized milk that never shows a cream line. The wholesomeness of respondent's milk is not questioned. If the fact that the container used by respondent does not show the cream line had any merit as a defense to this suit the Board of Health of the City of Chicago would not have recommended the use of paper milk bottles (R. 1698).

Presumption of Legislative Correctness.

[Answer to Petitioners' Brief, pp. 69-70.]

The comment of the Circuit Court of Appeals (R. 1794) that in the nature of things the City Council could not in 1935 actually have considered and weighed the advantages and disadvantages of paper milk bottles is entirely true, if viewed realistically. The technical argument of the petitioners is that in theory the presumption of correctness of the City Council's action attached in 1935 and "is not impaired by advancing age" (Petitioners' Brief, p. 70).

The admission by the petitioners (p. 70) that the reasonableness of the ordinance is to be tested at the time of an attack on it makes it unnecessary to determine just what weight is to be given in 1939, at the time of the decision of this case, to the action of the City Council in 1935. In the meantime the state legislature had approved single-service containers and, as stated under Point II, above, any presumption of legislative correctness which is to be applied in this case is one arising

from the action of the state legislature rather than from the action of the City Council.

The Circuit Court of Appeals correctly held that the action of the state legislature approving single-service containers made the city's attempted prohibition of single-service containers unreasonable as a matter of fact. Our argument on this question is found under Point II.

Use of Single Service Containers Throughout the United States.

[Answer to Petitioners' Brief, pp. 70-74.]

On the question of reasonableness, the experience of other municipalities was competent and persuasive in showing widespread use of paper bottles without injury to public health and in proving that the paper bottle was "standard". The trial judge properly accepted it for those purposes.

Under this heading, petitioners (p. 70) refer *inter alia* to the use of single-service paper milk bottles in the cities of Evanston and Winnetka. The experience of the City of Evanston in testing the respondent's milk and the paper bottle weekly showed that the bacteria count on quart containers "was very consistent with any of the other dairies putting out milk in bottles" (R. 675). The experience of the health department of the City of Evanston was such that it was never deemed necessary to go to the paper mills or fabrication plants for inspection purposes. If further and more severe tests than the rinse test were needed, the disintegration tests would be resorted to (R. 675). Paper bottles were investigated thoroughly for three years, and three to four hundred tests made before use of the paper bottles was permitted (R. 679-683). Evanston has and is enforcing the United

States Public Health Service model milk ordinance (R. 677-678, 683). No complaint ever existed in Evanston calling for supervision of the use of the paper bottle (R. 686); and the experience in Evanston showed that the bacteria count on glass bottles used for milk was higher than the bacteria count on paper milk bottles (R. 686-687).

Concerning the Village of Winnetka it should be understood that Dr. H. A. Orvis also supervises the control of milk for Highland Park, Lake Forest, Lake Bluff, Glencoe and Kenilworth by a contract between these municipalities and Winnetka (R. 567). They all operated under the model ordinance of the U. S. Public Health Service and had a rating of 96% from this body for the work performed. They have all used single-service paper milk containers since November, 1938 (R. 569). They interpreted the model ordinance as permitting these containers (R. 573-574). Bacteriological control of paper bottles equalled that of glass bottles (R. 585). The Illinois Department of Public Health rated the laboratory procedures employed in these municipalities at 100% and gave a total rating of 96.7 on all procedures employed (R. 577). Dr. Jordan, who sent monthly reports on the bacteria content of paper board as revealed by disintegration tests, was connected with the research department of the American Public Health Association (R. 583).

The daily sale of milk in single-service paper containers in Chicago by restaurants and drug stores was not prohibited or interfered with by the City or its Board of Health at any time (R. 940). This fact is not denied by any evidence or exhibit of petitioners. Exhibit 26 of petitioners (R. 1697) does not destroy the probative value of the evidence that milk actually is served in

paper containers in Chicago drug stores and restaurants. There is no evidence in the record that the use of paper containers in the City of Chicago by restaurants and hotels in the sale of milk has caused any damage to public health or has at any time ever been suspected of spreading disease.

Dr. Arnold testified that he had made no comparative bacterial tests on milk in glass and in paper (R. 1119), had no statistics that the bacterial count in paper was higher than in glass (R. 1120), did not know and had not investigated how many single service milk containers were used daily in the United States (R. 1134-1135), testified that the Board of Health had made no disintegration tests on milk container paper board (R. 1148), that he did not know whether paper milk bottles were used on trains or airplanes and never investigated that (R. 1165-1166), that he had never performed experiments to determine the amount of "chip" (reused stock) in paper board (Rec. 1168-1169), that he had never performed experiments on the harmfulness of acids in paraffin, although he had said that it was a health problem (R. 1177), that he never performed experiments on adhesives in Pure-Pak containers (R. 1179), that he had never performed experiments to see whether metal from printing ink got in the milk, although he had said this was a health problem (the City has wisely abandoned that contention) (R. 1181), that lead poisoning was a hazard although he had made no experiments and had no statistics (R. 1184), and that he never made any tests for the effect of respiratory secretions (R. 1190).

But Dr. Arnold was asked (R. 1166):

> "Doctor, if the control of milk is an ever-changing problem, as you testified on direct examination [R. 1066], is not the experience of public health authori-

ties throughout the country—and I am referring to public health authorities of cities—to be considered in determining whether or not the paper container presents a public health hazard?

"Dr. Arnold: Yes, possibly it is, yes.

"Q. But you made no investigation?

"A. No, sir."

This testimony from the chief witness for the City who also attended and counselled the petitioners' attorneys at all hearings and depositions (R. 1106-1107), is ample justification for the trial judge's refusal to ignore years of use and country-wide experience. The trial court in appraising the evidence tersely concluded that "experience is more persuasive than the theory of experts".

Dr. Paul H. Tracy testified that the Pure-Pak machine was used successfully at the model dairy of the University of Illinois College of Agriculture, which supplies the University Hospital and a regular milk route as part of the training of its students and of the researches of its professors (R. 503, 510, 526).

There is also evidence that the Pure-Pak container is being used in 481 separate municipalities, including the principal cities of the country as follows (R. 889-890):

Washington, D. C.,
New York City,
Philadelphia,
Baltimore,
Dayton, O.,
Indianapolis,
Detroit,
Minneapolis,
Seattle, Wash.,
Los Angeles,
San Francisco,
Oakland, Calif.,
Phoenix, Ariz.,
Flint, Mich., and
Louisville, Ky.

Approximately three or four hundred thousand Pure-Pak containers were being sold daily at the time of the trial (R. 890). [This figure is much larger now.]

The stipulation naming 68 municipalities in metropolitan Chicago which had been using this container for more than a year at the time of trial is set forth in the record (R. 692).

Dr. J. R. Sanborn testified (R. 38-40) that he had personal knowledge that the paper container was being used in New York City; forty cities and towns in the vicinity of New York City; Boston, Mass.; numerous cities and towns around Boston, such as Quincy, Cambridge, Somerville; and that it was being used in Baltimore, Philadelphia, Washington, D. C.; Detroit and Flint, Michigan; Duluth, Minnesota; Dayton, Ohio and Toledo, Ohio. He also testified that 40 or 50 cities and towns in Canada are using single service containers; Toronto, Hamilton, Sarnia, Peterborough and Guelph included (R. 153).

Mr. A. E. Carpenter of Sylvan Seal Milk, Inc., Philadelphia, which has a plant in Philadelphia using three Ex-Cell-O Pure-Pak machines and a plant in Baltimore using one such machine, testified by deposition that they deliver milk every day in the year except Sundays out of the Philadelphia plant to the Philadelphia area—including the City of Philadelphia, Trenton, N. J., Camden, N. J., Atlantic City, N. J., Wilmington, Del., and west of Philadelphia for about fifty miles to a great many towns (R. 1386) and that the Philadelphia plant alone is subject to the jurisdiction of 55 different health officers (R. 1390). Out of the Baltimore plant, Sylvan Seal Milk delivers milk to Baltimore and the City of Washington and also towns between Baltimore and Washington (R.

1386). The Philadelphia plant has a capacity of 120,000 quarts per day and this company has sold hundreds of thousands of quarts of milk in Pure-Pak containers (R. 1387). No complaints of absorption by the containers were received from any health authorities or customers (R. 1393).

All of the municipalities served by Sylvan Seal are ones which "certainly do", according to Mr. Carpenter, regulate the inspection, sanitation and handling of liquid milk and cream through their health departments (R. 1389), and they have approved the sale of milk in Pure-Pak containers (R. 1390).

Mr. Carpenter identified photographic copies, which are offered in evidence with his deposition, of letters from health authorities under which his company is doing business and identified the facsimiles as accurate and testified that he had seen the originals which were in possession of his company and that they were signed by those health officers (R. 1390-1391). None of these officers issued any other permits than the letters (R. 1391).

We shall not encumber this brief with all of these letters, but relevant excerpts are here set forth, because they have not previously been called to the Court's attention:

Plaintiff's Exhibit 5 (R. 1471):

From Herbert M. Packer, Chief Division of Housing and Sanitation, Bureau of Health, Philadelphia, Pa., November 27, 1936:

> "In reply to your query of November 23, regarding the use of paper milk bottles in the City of Philadelphia, we have found that they have complied with all the sanitary laws of this City, and

from an inspection which I, personally, made of your plant, I believe they are most decidedly a progressive step in the sanitary handling of milk."

Plaintiff's Exhibit 6 (R. 1471):

From Dennis J. Sullivan, Deputy Health Officer, Department of Health, Jersey City, N. J., November 28, 1936:

"Answering your second question first, this department does not object to distribution of milk in paper containers provided the containers are paraffined in the plant where they are filled and just prior to filling.

"Milk has been distributed in paper containers in Jersey City by four large milk companies for over a year, we see nothing objectionable about this method of distribution and apparently it is satisfactory to the consumer."

Plaintiff's Exhibit 7 (R. 1472):

From John C. Foote, Milk Inspector, Board of Health, Wilmington, Del., November 30, 1936:

"In answer to your phone call of November 27th in reference to our finding of paper containers.

"I want to say that they are without a doubt the best in our city, from a bacteria count they are almost 100%. I have never picked up a sample over 3,000 bacteria since they have been coming into our city, and I have visited your plant and find it complying with all our rules and regulations from a health standpoint.

"P. S. As you know I was opposed to the containers when they first made their appearance but after giving them a fair trial here, I will say they are a perfect container and will be a credit to any community."

Plaintiff's Exhibit 8 (R. 1473):

From W. K. Moffett, Director, Bureau of Milk Sanitation, Department of Health, Commonwealth of Pennsylvania, Harrisburg, Dec. 1, 1936:

"The Pennsylvania Department of Health has for a long time approved the use of paper containers for milk distribution. This includes the paper container which is made in the factory and paraffined before shipment to the milk plant in a sealed package, and the paper container made completely in the milk plant and subjected to a bath of hot paraffin just before filling. We think this latter bottle furnishes a container for milk which more nearly meets our standards for a sterile milk container than does the glass bottle put through the average soaker type washer where it has been subjected to an alkaline treatment and later a steam or hot water treatment.

"We have not been satisfied with the condition of the average glass bottle as it comes from a soaker type washer. It has been our experience that it is difficult to get a complete job of sterilization of the glass container due to the mechanical failures of the machine; the maintenance of the proper water temperature and the fact that the glass container has gone through an alkaline solution which, because of not being changed frequently may be a source of contamination rather than a cleansing agent. We feel so strongly on this subject that we contemplate adding a last rinse with chlorinated water.

"Supervision of the milk supply is much easier from a health standpoint where a paper container is in use than with a glass container. We also like the idea of the paper being used once and then destroyed. A glass container lends itself so easily to so many uses other than that of a container for milk and so often gets back to the milk plant in such bad condition that sterilization is such a difficult job that we would welcome the extension of the use of a paper container more generally."

Plaintiff's Exhibit 10 (R. 1474):

From Dr. George W. Grim, Milk Control Officer, Milk Control District No. 1, Associated Suburban Boards of Health, Ardmore, Pa., Dec. 2, 1936:

> "In response to your recent inquiry, please be advised that I am satisfied that the Silver Seal Dairies [Note: This is the prior corporate name of Sylvan Seal Milk, Inc.] have met substantially all of the requirements for the production, processing, distribution and sale of milk and cream in this District and have continued to do so. I particularly favor the use of the single service container for milk distribution. The difficulties we encounter in washing glass bottles are such that I doubt that they will ever be fully overcome."

If any such dire results as Dr. Arnold intimated would result from the use of paper containers, these other cities would have found it out long ago. These cities are comparable to Chicago. Chicago is neither any dirtier a place than they, nor are her problems of milk distribution any different in substance than theirs.

Every danger which the City pretends to fear from the use of paper containers is answered by the successful practical experience of cities of this country and Canada in using such containers.

In an effort to escape the force of the competent and convincing evidence produced as to the daily successful use of paper containers for milk elsewhere, petitioners say that they declined to accept the proffered issue and to introduce testimony as to prohibition in municipalities other than Chicago. The only answer to this is that there was no such evidence to offer. If it existed, petitioners would have brought it forth and they would have proven every prohibition or unsuccessful experience to justify their position. Not being able to meet this issue, peti-

tioners objected vigorously to the evidence and talked about peculiar local conditions in Chicago. What condition is peculiar to Chicago that makes experience elsewhere non-persuasive? The record is entirely silent.

Petitioners ask the Court to disregard the evidence. The Court is asked to ignore what the common man knows about paper containers and to accept instead theoretical objections which did not deter the state legislature from approving them.

Argument as to "future health hazards" from the use of paper containers is contradicted by the evidence in the record. Petitioners do not point to a single fact indicating any possibility of an outbreak of amoebic dysentery or any other disease because of the paper bottle. We concede that prevention is better than cure, but epidemics do not occur without cause and in the absence of any evidence whatever that paper containers have, could or might cause an epidemic, the Court need not guess or surmise that they will.

We have already referred to the fact that the rule in Illinois is that an ordinance enacted under a general grant of power from the state legislature may be set aside upon judicial review if it is so unreasonable "that there can be no question about it". No one isolated bit of evidence or type of evidence would satisfy that requirement, but obviously if experience had shown single-service containers to be dangerous elsewhere that would be relevant in determining that the city council of the City of Chicago was not acting unreasonably in prohibiting them. That being true, evidence of successful use elsewhere is competent and relevant in determining whether the city council of the City of Chicago is acting reasonably in rejecting not only the approval of the common man of paper containers for food, but also the specific successful

experience of other municipalities with single-service containers for milk.

The facts referred to in the quotation from *Standard Oil Co.* v. *City of Marysville*, 279 U. S. 582 (1928), show the question there under consideration to be debatable. If the announcement that "we may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body" is accepted as meaning that the court may not determine whether an ordinance of the City of Chicago is reasonable, then the case does not announce the Illinois rule which governs here and which has already been sufficiently set forth to furnish a ground of decision.

Regulation of Paper Milk Containers by the State of Illinois.

[Answering Petitioners' Brief, p. 74.]

Petitioners contend that the recognition of the use of paper milk containers by the State of Illinois "is merely another instance of their use elsewhere". An examination of Point II of our argument, above, will indicate our entire disagreement with any such theory. We think that the approval by the state legislature and its department of health is not only material but conclusive as to the unreasonableness of the city's action when it is considered that the city is a creature of the state.

Regulation of Paper Milk Containers in the Model Ordinance of the United States Public Health Service.

[Answering Petitioners' Brief, pp. 74-76.]

In determining the reasonableness of the Chicago ordinance the fact that the United States Public Health Service has approved single-service containers is properly a mat-

ter of notice. The argument that the Model Ordinance and regulations (R. 1699-1704) of the United States Public Health Service compel each municipality which permits single-service containers to inspect paper mills and fabrication plants is not borne out by the regulations themselves. We have already shown, in answering pages 56-66, of the Petitioners' Brief that tests which can be made within the municipality of the sanitary properties of the paper bottles to be used there are adequate to determine and control the sanitation of paper milk bottles just as effectively as the sanitation of glass bottles is controlled.

The City of Chicago has found no occasion to inspect mills or fabricating plants since the injunction was entered in the present case in October, 1940, and it has voluntarily permitted the use of paper containers not protected by such injunction without inspecting paper mills or fabricating plants and without there being the slightest intimation of detriment to the public welfare.

Use of Paper Containers for Other Purposes.

[Answering Petitioners' Brief, p. 77.]

The contention of petitioners (p. 77) that the use made of other paper containers in the city is not comparable to respondent's container is challenged and denied. The universal acceptance of paraffined paper containers for liquid and solid foods of all kinds cannot be explained away by pointing out superficial distinctions between milk and such other foods. Furthermore, at the time of the trial, milk was sold daily in the City of Chicago in paper cartons called "carry out service" cartons (R. 1482). Petitioners say that a Board of Health regulation (Petitioners' Exhibit 26; R. 1697) illegalizes this common practice known to everyone. But since the Board of Health

has made no effort to prevent such practice, its conduct amounts in effect to an approval of these carry-out containers as "sanitary dispensers", under the proviso of Section 3094 (R. 108-109).

The fact, if it be a fact, that the sale of milk and milk products by soda fountains and restaurants in the City of Chicago in paper containers is a violation of some Board of Health regulation does not detract from the persuasive force of the evidence as proving that there is no danger to the public health from such consumption of milk in paper containers.

The use of paraffin paper and paraffin paper board is so universally accepted as sanitary by the common man based on his experience that the attempt on the part of the city council of the City of Chicago to prohibit its use at this date is palpably arbitrary and unreasonable. The question is not made debatable by the mere fact that the attorneys for the City of Chicago do debate it.

The Proposal by the Board of Health that the City Council Permit the Use of Paper Containers.

[Answering Petitioners' Brief, p. 78.]

The Board of Health of the City of Chicago is charged by law with the enforcement of the health ordinances and is presumably composed of experts whose opinions on a question of fact would be entitled to great weight as an administrative determination of such question. Petitioners concede that during the pendency of this suit the Board of Health recommended the approval of single-service containers by the adoption of the model ordinance and regulations of the United States Public Health Service, and the only answer to this recommendation which the petitioners offer in this Court is that the regulations

require inspection trips to mills and fabricating plants which we have already discussed and shown to be unsound when viewed practically rather than theoretically.

The Conclusion on the Question of Reasonableness.

Petitioners have argued the question of reasonableness by dividing their arguments into numerous branches and saying that no single feature of this case proves the unreasonableness of the city council's action. We submit that in determining the question of reasonableness no single bit of evidence should be singled out as determinative. The question on this branch of the case is whether taking all of the evidence the respondent has so established the fact that its paper milk bottle is such a "known, wholesome article" that under the Illinois decisions the city council has no right to prohibit it.

If the petitioners are correct in saying that the Circuit Court of Appeals did reach the conclusion that the ordinance was unreasonable and invalid, we believe that such finding is amply sustained by the grounds referred to in the majority opinion. The following considerations lead clearly to ~~the~~ conclusion that the ordinance is unreasonable:

(a) Widespread use of paper generally for food products;

(b) The approval of single-service containers by the state legislature of Illinois;

(c) Approval of single-service containers by the director of the Department of Health of the State of Illinois;

(d) Approval of single-service containers by the United States Public Health Service;

(e) Approval of single-service containers by the Chicago Board of Health;

(f) Widespread and favorable use over a period of many years of single-service containers in cities comparable in size to the City of Chicago;

(g) Favorable use of single-service containers in the metropolitan Chicago area outside of Chicago after November 1938;

(h) The favorable and overwhelming opinion of experts from the University of Illinois and the New York State Agricultural Experiment Station.

To these favorable elements may now be added: Continued, successful use in practically every large city in the country, including the City of Chicago, and widespread use in army training camps.

If the evidence in the record and the facts of which the Court should take judicial notice are not sufficient to justify the finding of the trial court that the ordinance was invalid if construed to prohibit paper containers, then it is difficult to conceive of any case in which the Court would be justified in finding that the city council's action was "palpably arbitrary and unreasonable."

IV.

The Respondent's Single Service Container Is a "Standard Milk Bottle."

The District Court held that the respondent's single service container is a "standard milk bottle" within the meaning of the ordinance (R. 1756).

That the respondent's single service container is a "milk bottle" was apparent to the trial judge. He said (R. 1753):

> "The Court has no difficulty in holding that plaintiff's single service container offered and admitted in evidence in this case is a 'milk bottle' within the meaning of the ordinance. The definition of the word 'bottle' given by practically all lexicographers, as well as the meaning of the word as used in common speech, shows that the word has no limited and restricted meaning. It is a word of broad and extensive connotation. Webster's new International Dictionary states, among other things, that the word 'bottle is now so loosely used that its limit of application is not well-defined.'"

The trial court discussed the use of the word "bottle" in common speech, the accepted dictionary definitions of the word, the various types of containers that, historically, had been included within the connotation of the word, and concluded that there was no requirement that, as the petitioners contended, a milk bottle should be made of glass (R. 1753).

In discussing the word "standard" as used in the phrase "standard milk bottle" the Court pointed out that it was not confined to any local construction that might be placed upon the word, but might resort to the type or model which is recognized generally in the industry. In

particular, the Court placed its decision (R. 1755) of this aspect of the case on the sound ground that *"The ordinance is not static. The words are general and continuing in their operation. The ordinance must be construed in the light of new and changing conditions and current thought and practice. If, in the course of time, the advancement of science has produced a container which serves the same purpose as a glass container, and if the product delivered therein conforms to the requirements of sanitation prescribed by the health ordinances, then the ordinance must be given such construction as to permit the use of the later developed scientific container."*

It was urged by the City in the Circuit Court of Appeals that the construction of the phrase "standard milk bottle" by the District Court to include plaintiff's single service container was erroneous for the reason that this type of container was not in use at the time of the enactment of the ordinance in question, and the phrase "standard milk bottle" must be interpreted to include only such container or containers as the City Council might have been familiar with, or which were in use, on the date of the enactment of the ordinance. The Circuit Court of Appeals sustained this contention of the City and held that the construction placed upon the phrase by the District Court was untenable, that the words in legal sense could be interpreted only to permit the type of container that was a "standard milk bottle" when the ordinance was enacted, and that the glass bottle in use in the City of Chicago for delivery of milk at that time was the only receptacle contemplated or permitted by the ordinance. The Circuit Court of Appeals said (R. 1786):

> "Thus the theory of construction advanced by the plaintiff, apparently followed by the District Court, to the effect that the words 'standard milk bottle'

should be interpreted in accordance with the meaning of those words at the time of trial rather than their meaning at the time the ordinance was enacted, is not tenable. The recognition of such a theory would, in effect, impose legislative functions upon the courts. It would mean that a legislative enactment might mean one thing today and something else tomorrow. Changed conditions, of course, may make advisable a repeal or modification of existing legislation, but if so, the appeal should be to the legislature and not the courts."

As support for this view the Court cited the case of *People v. Barnett*, 319 Ill. 403 (1926), which does seem to hold that the words of a statute are to be construed in accordance with their meaning *at the time used rather than by a meaning subsequently acquired or given them.* However, since the decision of that case fifteen years ago, the question whether the meaning of a word or phrase as used in a legislative enactment may be extended to include within its scope a signification not present in the mind of the legislature at the time of such enactment has been definitely answered by the Supreme Court of Illinois in the affirmative. In *City of Chicago v. Bert Alpert, Inc.*, 368 Ill. 282 (1938)—a case not cited to the Circuit Court of Appeals—the Illinois Supreme Court held that "garages" as used in a state statute in 1911 included (*as present counsel for the City of Chicago contended*) vacant lots, called parking lots, which were not known at the time of the enactment of the statute. Even though the word "garage" meant an enclosed structure or building to the legislature in 1911 when the statute was passed, the Court said (p. 286):

"The General Assembly, in the quoted delegation of power, *did not define 'garages' thereby limiting the authority delegated by making the word 'garages' a static or dormant concept* rendering cities impotent

> to cope with the everchanging conditions of a mobile and complex society. In short, cities and villages are not restricted, in directing the location and regulating the use and construction of garages, to such premises as may have conformed to the accepted popular definition of the word 'garage' in 1911, when it was incorporated in the statute. Conditions attending the storage and parking of automobiles in metropolitan areas today are vastly different from those prevailing a quarter of a century ago when the State empowered cities to regulate and license garages. It is common knowledge that in cities considerable areas are devoted to parking and storing motor vehicles. Casual observation will disclose that in some instances the premises are denominated parking lots and, in others, outdoor or open-air garages. We are not required to be insensible to this mode of transacting an important part of the automobile business. The express power to regulate the use and construction of garages is sufficiently comprehensive to authorize cities and villages to license open-air as well as closed public garages. A legitimate exercise of this power is immune from constitutional assault." (Italics ours.)

The holding of the Circuit Court of Appeals that the language of the ordinance is to be interpreted as it was used by the City Council in 1935 was due to our failure to cite this decision in our brief in that Court. Contrary to the dictum in the earlier case of *People* v. *Barnett*, 319 Ill. 403 (1926) the later case is a controlling adjudication by the Supreme Court of Illinois which establishes that legislative language as used in an ordinance is dynamic, not static.

If a vacant lot used for parking automobiles is a "garage" within the meaning of a statute passed in 1911, then there is nothing incongruous in holding a paper milk bottle in 1939 to be a "standard milk bottle" as that term was used in 1935. It will be noticed that counsel for the City of Chicago were arguing for the dynamic interpreta-

tion of legislative language in the *Alpert* case, because that would sustain the claim of power to regulate open parking lots on the theory that they were "garages", whereas here they reverse their position and contend that legislative language must have a static, unchanging meaning.

Quite aside from the well-reasoned authority of the *Alpert* case, it would seem that the rule of construction there approved is highly desirable since it renders possible the prompt acceptance of improvements in a changing society. Law ought not to lag behind other sciences but should be sufficiently flexible to meet new conditions in all fields of industry.

The decision of the Indiana Supreme Court in *Uservo, Inc.* v. *Selking*, 217 Ind. 567, 28 N. E. (2d) 61 (1940), clearly supports our contention that the undefined phrase in the ordinance, "standard milk bottle" is a general phrase including all containers commonly used in selling milk (R. 1483, 1493, 1495). In that case the Court refused to hold the defendant liable for contempt for an alleged violation of a mandatory decree requiring delivery of a "standard milk bottle" because the decree there, like the ordinance here, did not define what a standard milk bottle was. The trial court there heard much evidence on the subject of what was a standard milk bottle, and in discharging the defendant who returned what he contended was a "standard milk bottle", the court at page 63 said:

> *"It will be noted in this case that the phrase, 'standard bottles', is not defined in the order. There seems to be no universal or well defined meaning of what does or does not constitute a standard milk bottle.* It was contended with much vigor in this case what might be a standard bottle in one city in Indiana might not be regarded a standard bottle in another. Much testimony was heard by the court concerning this subject. As was pointed out in the New

Jersey case, last above cited [*Bayer* v. *Brotherhood of Painters*, 108 N. J. Eq. 257, 154 A. 759], the appellee is not without remedy. If the order (assuming that the order is valid) is indefinite and ambiguous, a motion to modify and make more definite would be available to her." (Italics ours.)

Further, *Webster's New International Dictionary*, 2nd Ed. (Unabridged, 1937) states:

"* * * Bottle is now so loosely used that its limit of application is not well defined; it is generally distinguished from such vessels as jug or demijohn."

And *Century Dictionary and Cyclopedia* also defines it as:

"A hollow mouthed vessel of glass, wood, leather or other material for holding and carrying liquids. * * *"

Funk and Waynalls' New Standard Dictionary defines it as:

"A vessel for holding, carrying or pouring liquids having a neck and narrow mouth that can be stopped and specif: * * * any of various receptacles serving as a bottle."

It is apparent that respondent's bottle, today commonly used and referred to in the City of Chicago, Washington, D. C., and hundreds of other cities and villages as a "paper milk bottle", fits these definitions, and, as found by the trial court (R. 1752-56), is a "standard milk bottle" within the meaning of "standard" and "bottle".

In ascertaining the correct meaning of the words "standard milk bottle" we should not attribute to the City Council of the City of Chicago, the assumption that there would be no improvement ever made by science in developing milk containers. If a building ordinance required the use of "standard wallboard" or "standard

brick", no one would contend that only wallboard or bricks which were known and manufactured at the time of the ordinance could be used under such an ordinance. The very failure of the City Council to define the term "standard milk bottle" is an indication that it was to be given a broad meaning. Certainly the fact that a particular type of "standard milk bottle" was then generally accepted is no reason for assuming that in the future, when other standard milk bottles had been generally accepted in the industry such later standard milk bottles would be excluded. In a changing civilization it cannot be assumed that the legislature intends that things shall stand still. The law must be dynamic and not static. The shapes of glass milk bottles have varied from time to time, but no one has argued that they cease to be "standard" because shapes have changed.

We therefore respectfully submit that the question in this case is not what was meant by a "standard milk bottle" precisely at the time the ordinance was adopted, but what is meant by "standard milk bottle" at the time the ordinance is being enforced.

The evidence shows without contradiction that cities operating as is the City of Chicago, under the United States Public Health Service Model Milk Ordinance, from which the term "standard milk bottle" is taken, have, without amending their ordinances, construed it as did the trial court, so as to include single service containers (Oryis, R. 574).

In the mimeographed copy (January, 1939) of the United States Public Health Service Model Ordinance, Section 10, (which corresponds to Section 3094 of the Chicago ordinance), required "standard milk bottles", (Krueger, R. 993-994, Deft's Ex. 16, R. 1677) but, as admitted by the witness Krueger (R. 983, 995) the Code ac-

companying it contained items 12-p and 15-p, which were as follows:

Item 12-p:

> "All milk and milk products, containers and equipment, except *single-service containers*, shall be thoroughly cleaned after each usage. All containers shall be subjected to an approved bactericidal process after each cleaning and all equipment immediately before each usage. When empty and before being returned to a producer by a milk plant each container shall be effectively cleaned and subjected to bactericidal treatment."

Item 15-p:

> "Milk bottle caps or cap stock, parchment paper for milk cans, and *single-service containers* shall be purchased and stored only in sanitary tubes and cartons, respectively, and shall be kept therein in a clean, dry place." (Italics ours.)

Thus we find municipalities, and even the United States Public Health Service itself, construing the term "standard milk bottles" as including paper single service containers. The amendment to section 10 of the model ordinance, adding "or in single service containers", was made in June, 1939, after the contention of the City of Chicago that single-service containers were *not* standard bottles, was widely known (Krueger, R. 994-995, Deft's Ex. 17, R. 1678).

Clearly, the learned trial judge was correct in holding that "plaintiff's single service paper containers, as offered and admitted in evidence, are 'standard milk bottles within the meaning of the ordinance'" (R. 1755-56).

The Circuit Court of Appeals in its opinion referred to certain instances in which distinctive terms were used in the testimony and in correspondence distinguishing between glass milk bottles and paper containers. Since

this entire controversy revolves around differences between glass milk bottles and paper milk bottles it is not at all strange that the descriptive terms used in the course of the controversy to describe glass bottles and paper bottles should have differentiated between them. In considering the weight given to this evidence by the Circuit Court of Appeals, it should be remembered that that court was deciding whether the term "standard milk bottle" when used in the year 1935 included a paper milk bottle. We submit that under the *Alpert* case discussed in this subdivision of our brief, the meaning of the term in 1940 and not its meaning in 1935 was the ultimate fact to be reviewed by the Circuit Court of Appeals. The District Court had decided that the term "standard milk bottle" did reasonably include a paper milk container in October, 1940, when the District Court decree was entered. Since the reasoning by which the trial court reached that result is sustained by the doctrine of the *Alpert* case—that undefined general language is to be given the meaning which from time to time it acquires—the finding of the District Court on this issue should be affirmed.

The approval of single service containers by the Illinois legislature and the voluntary action of the City of Chicago since October, 1940, in permitting the use of containers not protected by the decree in the present case should indicate to this Court that no actual health hazard is involved, but that the questions to be decided are mere legal questions. The trial court found expressly that single service containers present no health hazard, the Circuit Court of Appeals denied a supersedeas to stay the operation of the trial court's injunction, and the majority opinion of the Circuit Court of Appeals indicates its agreement with the District Court that these

containers present no health hazard. An application of the rule invariably applied by this Court that it will not disturb the finding of fact approved by a District Court and the Circuit Court of Appeals rebuts any contrary argument of the petitioners. In addition, the record itself abundantly sustains the proposition that paper milk bottles present no health hazard.

V. Conclusion.

Without repeating the evidence on the issues in this case, we do desire to summarize in a way not hereinbefore presented some of the respects in which the Pure-Pak paper milk bottle is superior to the glass milk bottle.

Not only does the Pure-Pak single service container have merit in the sense that it has not created any health hazard, but it also has a tremendous affirmative health advantage over a glass milk bottle, all of which must be considered in determining whether the City of Chicago is acting reasonably in excluding this paper bottle from the Chicago market, especially when the Board of Health in charge of enforcing the ordinance and protecting the public health of the city approves, and by its official action, recommends its use.

First: The Pure-Pak container is used only once. This eliminates all danger of the bottle itself contaminating anyone else, eliminates the hazard of possible human or mechanical failure in washing to which the multi-service container is subjected, and is of great usefulness in hospitals, particularly isolation sections for contagious diseases, where concededly sometimes cross-contamination occurs.

Second: Immediately before being filled and after the Pure-Pak container has had its last manual handling (being handled on the outside edges only) the container goes into a hot paraffin bath which concededly has *some* bactericidal effect. The amount of this bactericidal effect is not so important as the fact that concededly it has some effect which is distinctly helpful from a public health standpoint.

Third: The container is tamper proof. The contents cannot be removed without tearing open the pouring spout

or defacing beyond replacement the wire staple. Each paper container bears printed or indelibly stamped upon it the date it is to be sold and there can be no transferring of the contents from one container to another or no "switching" of milk bottle caps such as may occur in the case of the ordinary glass bottle with a plug cap, with or without an unlocked "hood." That this feature of Pure-Pak containers prevents a definite evil is indicated by the "public health reason" of the Chicago Board of Health appended to Section 3094 of the ordinance (R. 109):

> "Another practice on the part of some distributors is the filling of returned bottles along the milk route, particularly at retail depots. This item expressly forbids this practice."

Fourth: And second only to the single service feature of the container in importance, the pouring lip over which the milk or cream passes after the pouring spout has been opened is tightly sealed at all times from the moment that the side-seam of the flat-blank is mechanically sealed at the converting plant until the customer himself tears open the pouring spout. At all times, therefore, that part of the container over which the contents flow is sealed against contamination, even in the dairy itself. Compare this with the ordinary glass milk bottle whose pouring lip projects upward at a place where contamination is most likely to occur—this being the very point, and the only point, over which the contents of the glass bottle invariably flow.

Fifth: The Ex-Cell-O Pure-Pak machine which fills the containers is operated by two persons instead of the three needed in a typical glass bottle dairy with a ratable reduction in the hazard from human contamination.

Sixth: After flat blanks are taken from the sealed packages and placed upon the machine by the operator, who for this purpose grasps them on the outside edges, the filling operation is in a covered machine and the paper bottle is not again touched until it has been formed, the bottom flaps sealed, the whole bottle paraffined, automatically filled, closed and stapled and inspected by the use of a light behind the passing line of bottles. Contrast this with a line of empty glass milk bottles travelling from the washing department to the filling department, subject to all of the bacterial contamination that may be in the air of the dairy as well as to the possibility of human contamination. (For a good comparison between paper and glass operations, see Tonney, R. 903-911).

Seventh: The filling operation takes less time after the container is last touched by hands until the operation is completed than in the case of the glass bottle. The less time taken in the filling operation, of course, the less opportunity for contamination in that process.

Eighth: The bottom of the Pure-Pak paper bottle is square so that a number of them tightly packed together prevent the circulation of warm air and thereby more easily keep the contents cool, an extremely important health feature in view of the effect of low temperature in preventing the multiplication of bacteria in milk.

Ninth: Paper is a better insulator against heat than glass so for that additional reason it is easier to keep cool the milk in such containers than in glass containers.

Tenth: The shape, weight and size of the corrugated cartons into which the paper bottles are placed at the dairy for distribution lend themselves ideally to refrigeration in the truck and encourage adequate refrigeration. Compare this with an open crate of glass milk

bottles. From a health standpoint, the low bacteria count of the milk when it is delivered to the consumer is the object sought and paper bottles best attain that end.

Eleventh: There is no danger of glass breaking and cutting anyone.

Twelfth: There is no danger of glass from this or other broken bottles getting into the milk.

Thirteenth: Owing to the facts that the containers to be filled are shipped direct from the factory and need not be transported from the stores or customers and that the containers when filled are lighter and more compact and more easily kept cool en route than glass bottles in crates, the pasteurizing and bottling of the milk in paper bottles can be done economically right in the dairy region, reducing the time between "cow and consumer." This reduces the opportunity for bacteria to multiply, because multiplication of bacteria depends upon time and temperature. The milk stays fresh longer in the hands of the customer.

Other considerations of present national policy in conserving automobile tires and manpower are promoted by paper milk bottles, as follows:

Fourteenth: Milk delivered in paper milk bottles saves man power by increasing store sales and cutting down on house-to-house deliveries. The convenience, light weight and lack of danger of breakage induces the customer to carry the milk from the store rather than having it delivered to his door.

Fifteenth: Paper bottles filled with milk weigh less than half as much as a similar quantity of filled glass bottles. This lighter weight and the improved method of distribution which such lighter weight makes possible result in the saving not only of labor but of trucks, rub-

ber tires, gasoline and wear and tear on streets and highways for the reasons that:

(a) Wholesale deliveries to stores rather than retail delivery from house to house is promoted as stated in the next preceding paragraph;

(b) Each delivery truck can carry a great deal more milk than in glass containers without increasing the total weight of the load;

(c) There is no heavy return load of crates and bottles as in the glass bottle operation.

For the reasons stated, we submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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